No. 2968

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DEXTER HORTON TRUST & SAVINGS BANK, *Appellant,* *vs.* THE COUNTY OF CLEARWATER of the State of Idaho, and OREN D. CROCKETT, as Terasurer of said County, *Appellees.*	No. 2968.

Upon Appeal from the United States District Coart, District of Idaho, Central Division.

BRIEF OF APPELLANT

PETERS & POWELL,
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The Ivy Press, Third and Columbia, Seattle

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STATEMENT OF THE CASE.

This action was brought in the District Court of the United States for the District of Idaho by Dexter Horton Trust & Savings Bank, a corporation of the State of Washington, against the County of Clearwater, State of Idaho, and its Treasurer, Oren D. Crockett, a resident and citizen of that State, to obtain an injunction. The District Court,

after a final hearing upon the merits, entered a judgment dismissing the action. From which judgment Dexter Horton Trust & Savings Bank prosecutes this appeal.

In the year 1914 the defendant county issued to M. G. Nease, then and at all times since a resident and citizen of Oregon, its warrants aggregating the amount of $44,072.69. On the 7th day of July, 1915, Dexter Horton Trust & Savings Bank purchased these warrants from Nease, paying therefor the sum of $45,594.34. (Record p. 220.) The amount paid was principal and accrued interest less one-half of one per cent. (Record p. 222.) After the purchase of the warrants by the appellant a change in the personnel of the county officers was effected by a general election, and the county, through its new officers, refused to recognize the warrants as valid obligations of the county. (See Par. 31 of defendants' answer; Record p. 43.) This action was then brought by the appellant to restrain the defendants from dissipating to other purposes the funds of the county which were, by law, applicable to the payment of appellant's warrants.

The facts out of which the controversy arose, the questions involved, and the manner in which they are raised are, briefly, as follows:

There is a very large amount of timber lands in Clearwater County. On the 24th of February, 1914, the defendant county entered into a certain contract with M. G. Nease to cruise the timber in two townships, but this contract was, by mutual consent, rescinded. (Record pp. 479, 480.) On April 15, 1914, the defendant county entered into a contract in writing with the said M. G. Nease, whereby Nease agreed to

> "make and cause to be made a careful, complete and thorough cruise and estimate of all the timber on the patented lands situated in Clearwater County, Idaho,"

with certain exceptions.

This contract was made for the purpose of supplying to the county the information necessary to enable the assessing officers of the county adequately and properly to assess, for taxation, such lands. The proceedings of the board of county commissioners of defendant county in authorizing and making the contract and a copy of the contract are found at pages 479 to 494 of the printed record. As frequent reference will be made to the various terms of the contract we herewith set it out in full, omitting formal parts and signatures:

That for the consideration hereinafter provided, to be made and paid to the second party (Nease) by the first party (Clearwater County),

the second party hereby covenants, contracts and agrees:

1.

That he will make and cause to be made a careful, complete and thorough cruise and estimate of all the timber on the patented lands situated in Clearwater county, Idaho, said cruise to be completed on or before the 15th day of June, 1915; excepting such of said lands as the first party may from time to time withdraw from this contract, that is to say there are certain lands in Clearwater county of which the assessor knows the true cash value without the necessity of having a cruise thereon, and the first party shall have the right to withdraw such lands from time to time prior to the cruising of same, and the lands so withdrawn shall not be cruised.

2.

That upon said cruise being made from time to time, the second party agrees to make reports of said criuse, said reports to contain topographic sketches showing the elevation of lands above sea level, taken by means of Aneroid barometers, said reports to show all openings, burns, marshes, rivers, lakes, creeks, trails, roads, waterfalls, valuable stone, mineral out-croppings and all other topographic features observed by the cruisers, said reports and sketches to show a general description of the character of the lands cruised, describing its adaptability for agriculture, grazing or other purposes after the timber is removed, said reports to describe the character of the different varieties of timber, giving the average stump diameter, the average number of 16 foot logs per tree, the percentage of surface clear timber, said reports to describe logging conditions, showing distance to outlet such as railroads or

driving streams; said reports to show damage by fire or otherwise, and the probability of fire; and will furnish all blue prints, blanks and binders for reports at his own expense, and all reports herein agreed to be furnished to said first party shall be upon such quality of paper and of the size and form and contain all the data above provided accordingly as shall meet the approval of said first party.

3.

That in making said cruise the second party shall use as a basis in estimating saw timber all trees having not less than a 12 inch stump diameter to an 8 inch top and as a basis in estimating cedar poles all cedar trees not included as saw timber which have a top diameter of not less than six inches 25 feet above the stump, all fir and tamarack which shall not be classed as saw timber shall be designated and counted as ties, and for this purpose a tie shall be considered as being eight feet long and of standard dimensions.

4.

The second party shall also as a part of this contract furnish and file with the Board of County Commissioners of Clearwater county, a bond with surety to the satisfaction and approval of the first party in the sum of Ten Thousand dollars, which shall provide that the second party shall faithfully perform all the terms and conditions of this contract on his part to be done and performed, which bond shall continue and be in force and effect from the 15th day of April, 1914, up to and until the 1st day of October, 1915, and no money shall be paid to the second party under the terms of this contract until such bond shall be filed and approved by the said first party.

5.

In consideration of the true and faithful performance by the second party of the terms and conditions of this contract on his part required to be done and performed, the first party agrees to pay to said second party or to his order or assigns, a sum equal to twelve and one-half (12½) cents per acre, for all lands cruised and reported on by said second party, accordingly as aforesaid, which shall be accepted and approved by the first party as follows, that is to say:

That at each regular term of the Board of County Commissioners or at a special meeting called for this purpose by said Board of County Commissioners of said county during the life of this contract, said Board of County Commissioners shall examine, accept or reject all reports filed by the second party prior to said meeting and shall,

Then give to the second party or to his order or assigns, an acceptance or rejection in writing, as the case may be, of the said reports, and all acceptance shall state and specify the amount due the second party for said work; and shall at each meeting above provided, order to be issued to the second party or his order or assigns, county warrants drawn on the current expense fund for an amount equal to 80% of the amount due the second party as shown by the accepted reports, the remaining 20% shall be paid to the second party or his order or assigns within 60 days after the completion of the contract and the acceptance of the work.

6.

It is further agreed by and between the parties hereto, that in case any cruise made by the second party as shown by his said reports shall be disputed and the owner of the timber so cruised desires to

have the same recruised, and the board of county commissioners of Clearwater County shall make demand therefor, that both parties to this contract shall select some competent cruiser satisfactory to both parties, and the cruiser so selected shall go over and cruise the tract or tracts in dispute, and the cruise of the party so selected shall be taken as final. If the cruise of the party so selected as arbitrator varies more than 20% above or below the cruise of the second party, then the compensation of said arbitrator and expense of said recruise shall be paid by the said second party, but in case the cruise of the arbitrator shall not be more than 20% above or below the cruise of the second party, then the compensation of said arbitrator and expense of said recruise shall not be paid by the second party.

7.

It is further stipulated and agreed, that all cruises that shall be rejected by the first party shall be corrected and the proper report and correct cruise of the land included therein shall be made by the second party accordingly as directed by the first party, and if the second party fails so to do, the first party shall have the right to cause the same to be cruised and the reports accordingly as hereinbefore agreed to be made, and the cost and expense thereof above twelve and one-half cents per acre shall be paid by the second party to the first party on demand, and the payment thereof shall be secured by the bond filed herewith.

8.

The second party hereby agrees that he will not sub-contract any part of the work to be done under the terms of this contract.

Nease was required by paragraph 4 of the contract to furnish, and did furnish, a bond in the

sum of $10,000, conditioned for the faithful performance of the contract. (Record pp. 493, 494.)

Nease, from time to time as the work progressed, filed reports accompanied by verified claims for the amount due him under the terms of the contract for the work done as shown by the reports. These were accepted by the board of county commissioners of the defendant county, and the claims were allowed for 80%, according to paragraph 5 of the contract; and, after the completion of the work, the board duly allowed the balance of 20% due under the contract. (Record pp. 223, 224, 225; Pl. Ex. 4, 5, 6, 7, 8, shown at pp. 495 to 551 of the printed record.) Warrants were issued to Nease in the aggregate amount of the claims allowed, and a portion of the warrants so issued amounting to $18,926.99 with accrued interest, were sold by Nease to the Empire National Bank of Lewiston, Idaho, and were paid by the defendant county. (See par. 27 of the affirmative answer, Record p. 40, Testimony of Nease pp. 332, 344.)

The laws of Idaho create in the treasury of each county a fund known as the warrant redemption fund, out of which the treasurer is required to pay warrants which have been issued and presented for payment, but not paid for want of funds.

The statute also requires the treasurer, when warrants are presented which cannot be paid for lack of funds, to stamp the same "Not paid for want of funds," with the date of presentation, and to register the same. Thereafter such warrants are required to be paid by the treasurer out of the warrant redemption fund in the order of their previous registration.

The warrants which the appellant purchased and which are in controversy here had been, prior to their purchase by the appellant, duly presented, stamped "Not paid for want of funds," and duly registered. (Record p. 221.) After the purchase of the warrants, the appellant discovered that two of them, numbered 7633 and 7638, respectively, had been improperly stamped in that the date of the registration stamp had been omitted. The appellant returned these two warrants to the treasurer of Clearwater county with the request that the treasurer supply the omitted date and that the warrants be returned to the appellant, which was done. (Record p. 221.) At the time appellant purchased the warrants, it had no notice of any claim of the county against their validity, and first learned of defendant county's objections to them in September or October, 1915. (Record pp. 221-222.)

The defendant treasurer threatened to pay out the funds in the warrant redemption fund in the payment of warrants registered subsequent to appellant's warrants. The appellant thereupon brought this suit to restrain the threatened unlawful diversion of the funds by the treasurer, and made the county itself, as well as the treasurer, a party defendant.

The bill of complaint sets out the issuance of warrants to Nease, their presentation and registration; that the same are payable out of the warrant redemption fund of the defendant county in the order of their registration; that the treasurer is threatening and declaring that he will pay out of said fund outstanding warrants registered subsequently to the registration of those of the appellant which will deplete the fund so as to leave no funds for the payment of appellant's warrants; and praying for an injunction restraining the defendants from paying out of said warrant redemption fund any warrants registered subsequent to any of appellant's warrants while any of appellant's warrants remain unpaid, and requiring defendant treasurer to call and pay warrants out of said funds in the order of their registration and not otherwise, and for general relief. (Record pp. 7 to 17.)

The defendants, by their answer, and amendments to the answer, deny that the board of county commissioners had any authority to issue any of the warrants upon which appellant based its action, and deny that the defendant county was indebted to M. G. Nease in any sum whatever represented by the warrants, and deny the validity of the warrants and their registration. The answer admits that the defendant treasurer threatens to pay out the funds in the warrant redemption fund in the payment of warrants registered subsequent to appellant's warrants. (Par. 13 of the Answer; Record p. 23.) The answer also sets up the following matter in substance:

1. That the warrants were issued to Nease for cruising done under the above mentioned contract, and that the board of county commissioners made no provision in the tax levy of that year for the payment of the indebtedness incurred thereby; that such indebtedness was not a necessary and ordinary expense and therefore void under Section 3 of Article 8 of the Constitution of Idaho. (Par. 24, 25, 26 of the Answer; Record p. 39.)

2. That the cruising was contracted for and made for the purpose of furnishing a basis for the valuation of lands for assessment purposes and was not made by the assessor or his deputy who alone, it was alleged, under the laws of Idaho, could

lawfully be authorized to do such work; that therefore the county commissioners had no power to contract with Nease to do the work. (See Par. 22-23 of Answer; Record pp. 37-38.)

3. That the contract was entered into fraudulently and collusively by the county commissioners and Nease. (See amendment to the Answer, Par. 1 and 2; Record pp. 150 to 152.)

4. That the work of Nease was improperly done, and of no value to the county. (See Par. 18 to 21, inclusive, of the Answer; Record pp. 34 to 37.)

5. That there was allowed to Nease, and included in the amount for which warrants were issued, compensation for cruising a certain amount of unpatented lands belonging to the United States, and a certain amount of lands belonging to the State of Idaho and also untimbered lands. (Par. 30 of the Answer; Record p. 42.)

6. That the bills which Nease filed with the board of county commissioners for work done under the contract and for which the warrants were issued were fraudulently allowed. (See Par. 4 and 6 of Amendment to the Answer; Record pp. 151-152.)

7. That the contract was improvidently entered into and at an excessive price. (See Par. 12 of the Answer; Record p. 31.)

8. That the treasurer is not bound to pay the warrants because no list of the claims allowed by the board of county commissioners, and for which the warrants were issued, was certified to the treasurer by the county commissioners, as required by the laws of Idaho. (Amendment to the Answer, Par. 1; Record p. 154.)

9. That the warrants are void because they do not specify the liability for which they were drawn, and when such liability accrued as required by the laws of Idaho. (Amendment to the Answer, Par. 2; Record p. 154.)

The answer concludes with a prayer that:

(a) Plaintiff's bill be dismissed.

(b) The contract between Nease and defendant county be decreed to be illegal and void.

(c) The warrants be declared illegal and void.

(d) The warrants be delivered up for cancellation.

(e) The county be decreed not to be liable for any indebtedness for and on account of said warrants.

(f) That the defendants have such other relief as to the court may seem proper. (Record pp. 43-44.)

The appellant, conceiving that the answer, since

it demanded affirmative relief, was in effect a counter claim, within the meaning of Equity Rule No. 31, filed a reply and filed an amended and supplemental reply at the trial. By its reply appellant admits the making of the contract between the defendant county and Nease which is pleaded in Par. 10 of defendants' answer. (Record p. 29.) The reply also admits that the warrants in question were issued for work done by Nease under that contract. (See Reply, Par. 5; Record p. 156; Par. 23, Record p. 167.)

At the trial, however, the appellant admitted that all of the affirmative matter of the answer not denied in the reply should be considered as admitted by the appellant, and that the allegations in Par. 26 of the answer should be considered as admitted. The result of this admission by the appellant is that it admits that no provision was made to meet the debt incurred under the Nease contract in the tax levy of that year. It is also admitted by the appellant that the indebtedness was not authorized by a vote of the electors of the county. (Record pp. 218-219.) The appellant, however, contends that the indebtedness is a necessary and ordinary expense within the meaning of Section 3 of Article 8 of the Constitution of Idaho.

A trial was had before the court without a jury, commencing on the 8th day of May, 1916, and succeeding days. (Record p. 217.) Upon the conclusion of the evidence the court took the case under advisement and, on the 29th day of July, 1916, rendered an opinion in writing holding, in substance, that:

(a) There was no fraud in the making of the contract.

(b) There was no fraud practiced on the board of county commissioners in procuring the allowance of the claims for which the warrants were issued.

(c) That the warrants were invalid for the following reasons:

1. The county commissioners had no power to contract with Nease to cruise the timber lands of the county for assessment purposes because such work could legally be done only by the county assessor or his deputies.

2. That the action of the board of county commissioners in letting the contract was in violation of Sec. 3 of Art. 8 of the Constitution of Idaho in that the

expense incurred thereby was in excess of the revenues provided for the year in which it was incurred, and was not authorized by a vote of the electors of the county, and was not an ordinary and necessary expense within the meaning of the above section of the Constitution. (Record pp. 173 to 208.)

On the 11th day of September, 1916, the court entered a decree dismissing the action. (Record p. 209.)

This decree (omitting formal parts) was as follows:

"This cause came on to be heard at Moscow, in Latah County, State of Idaho, on the 8th day of May, 1916, and evidence was introduced, both oral and documentary, and the cause was argued by counsel for the respective parties and taken under advisement.

"And thereupon, upon consideration thereof, it was ordered, adjudged and decreed that plaintiff's bill be and the same is hereby dismissed and that defendants recover their costs herein in the sum of $535.60.

"Done this 11th day of September, 1916."

From this decree Dexter Horton Trust & Savings Bank prosecutes this appeal.

SPECIFICATIONS OF ERRORS RELIED UPON.

The District Court erred and its decree was erroneous in the following particulars:

I.

Because the court erred in adjudging and decreeing that the bill of plaintiff be dismissed, and that the defendants recover their costs of the plaintiff, for the reasons more particularly set forth in the specifications following. (This is assignment of error No. XVI, shown at p. 784 of Record.)

II.

Because the court erred in failing and refusing to enter a decree adjudging that each of the warrants described in the plaintiff's bill of complaint was a valid obligation of the defendant Clearwater County for the amount for which the same was drawn with interest. (This is assignment of error No. XX, shown at p. 785 of Record.)

And the court erred and the decree is erroneous in this regard particularly for the following reasons:

1. Because the fact that, under the contract between Nease and the defendant, the cruising was to be done by persons other than the assessor or his

deputies did not render the contract invalid.

2. Because neither said contract, nor the issuance to Nease for work done thereunder of the warrants in suit was violative of Section three of Article eight of the Constitution of Idaho.

3. Because said warrants are in the form required by the laws of Idaho.

4. Because the contract was performed by Nease, his work accepted by the defendant county, and his claims therefor duly allowed by the Board of Commissioners of the defendant county which is bound thereby.

5. Because there was no fraud in the making of the contract, and the same was in all respects the valid contract of the defendant county.

III.

Because the court erred in failing and refusing to enter a decree adjudging that the claims of M. G. Nease, allowed by the board of county commissioners of Clearwater county for work performed and materials furnished by M. G. Nease to the said county under the contract in writing between said M. G. Nease and said Clearwater county, dated April 15, 1914, were each and all valid debts against

said Clearwater county. (This is assignment of error No. XXII, shown at p. 786 of Record.)

IV.

Because the court erred in failing and refusing to enter a decree adjudging that the defendant Clearwater county was indebted to the plaintiff in the sum of forty-nine thousand five hundred sixty-one and 99/100 dollars for and on account of the labor and material furnished to the said county by M. G. Nease in the performance of the contract between the said Nease and the said county, dated April 15, 1914. (This is assignment of error No. XXI, shown at p. 785 of Record.)

V.

Because the court erred in failing and refusing to enter a decree for the plaintiff and against the defendant county for the sum of forty-nine thousand five hundred sixty-one and 99/100 dollars, being the amount, principal and interest, due at the date of the entry of the decree, to the plaintiff from the defendant county for and on account of said warrants. (This is assignment of error No. XIX, shown at p. 785 of Record.)

The appellant specifies and relies upon the fol-

lowing errors committed by the court in the admission of evidence:

VI.

Because the court erred in failing and refusing to adjudge and decree that the said defendants, and especially said defendant treasurer, be required to call and pay out of the warrant redemption fund of the defendant Clearwater county all of the outstanding warrants of said county held by the plaintiff and described in its bill of complaint in the order in which the same were in point of time registered by the said treasurer. (This is assignment of error No. XVIII, shown at p. 785 of Record.)

VII.

Because the court erred in failing and refusing to adjudge and decree that the said defendants, and especially said defendant treasurer, Oren D. Crockett, as treasurer of the defendant county, be restrained and enjoined from paying out of the warrant redemption fund of the said county any warrants drawn by said county and payable out of said fund while there should remain outstanding and unpaid any of plaintiff's warrants of prior registry and described in the bill of complaint. (This is covered by assignment of error No. XVII, shown at p. 784 Record.)

VIII.

Because the court overruled the objection of the plaintiff to the reading from the deposition of the witness Charles Portfors, a witness for the defendants, of the answer to the question propounded to the deponent by defendant's counsel. The witness had testified that he was a timber cruiser and that his method of cruising was to double run; that is, to pass through each forty acres twice in making his cruise. Thereupon the following questions propounded to the witness by counsel for the defendants was read:

> "Have you usually made any exceptions? If so, why and under what circumstances?"

Thereupon the plaintiff by its counsel objected to this question and to the witness' answer to the same being read upon the following grounds:

(a) That the purpose of the testimony sought to be elicited from the witness and also by subsequent questions was to show that the work done by the cruisers who were in the employ of M. G. Nease was not properly done and to examine into the question as to whether Nease had properly performed his contract in doing the work which he was required to do thereunder and to show that the work done by Nease in the performance of his contract had not in the

opinion of the witness been done in a correct manner.

(b) That the board of county commissioners of Clearwater County was under the law charged with the duty and power of accepting or rejecting the work done by Nease and that, having accepted the same after the performance by Nease, the county is bound by such acceptance, which closes all inquiry into the question of whether the contract had been properly performed or not, in the absence of a showing that the commissioners had been induced to make such acceptance by some fraud or deceit practiced upon them in the matter of acceptance.

Thereupon the court ruled that the defendants would be permitted to show if they could that the work of the contractor Nease was so improperly done that no honest man would accept it for the reason that such facts if proven might reflect upon the motive of the parties to the contract in the letting of the same. Thereupon the deponent's answer to the question was read and was to the effect that he had run through forty-acre tracts occasionally four times when he thought it necessary and occasionally made single runs. That he made single runs in burnt tracts when there was not

enough timber to justify buying it, but not in green timber. And continuing the deponent Portfors further stated that four forty-acre tracts per day is a good average for a cruiser's work; that a cruise arrived at by passing once through each forty-acre tract would not have any value for assessment purposes because a man could not see the timber and get an average on a single run.

This ruling of the court was error.

This appears in the record as assignment of error No. III. (Record p. 767.) The evidence offered and appellant's objections thereto, and the ruling of the court appear at pages 233, 234, 235 of the printed record.

IX.

Because the court erred in admitting in evidence Defendants' Exhibit Three under the following circumstances:

Defendants' Exhibit Three was identified by the witness M. G. Nease as the report of one Archie Young of his cruise on section four, township 39 north, range three east. This report was made by Archie Young to M. G. Nease and is dated April 25 and 26, 1914, and there is the following notation in the margin of this report: "These two forties were

actually cruised, balance done in camp." When this document was offered in evidence by the defendants' counsel, plaintiff objected to its being received in evidence on the ground that the court could not in this case examine into the correctness of the work done by Nease and that all questions in regard to the sufficiency of the performance of the work had been concluded by the acceptance of the work by the defendant county and that the evidence offered did not in any manner tend to substantiate any of the allegations of the answer of collusion or fraud.

The plaintiff by its counsel requested that it be understood that this objection be taken and considered as made to all evidence that should be offered for a like purpose.

Thereupon the court made the following ruling:

The Court: "Of course, gentlemen, it ought to be understood at this time that if you are going into this matter at all you will have to take it up in such a way as to make it a circumstance tending to show a fraudulent agreement or understanding between this witness and the board of county commissioners. We can't be drawn into an inquiry at this time as to the correctness of the work itself. In other words, we are not going to sit here as a board of county commissioners would sit for the purpose of determining whether or not the warrants should have been drawn or the bills allowed, unless you go

> further and show that there was a fraudulent understanding or collusive arrangement between this witness and the board of commissioners, pursuant to which the board went through the form of allowing his claims without examining into them, and they both understood that the work would not be properly done."

Counsel for defendants then stated to the court that they would later connect up the evidence offered and that it was submitted for the purpose of showing fraud and collusion, because if that kind of work was passed by the commissioners that would tend to show such fraud and collusion.

The plaintiff by its counsel then made further objection to said report being received in evidence on the ground that there was no proof before the court as to who had made the annotation in the margin thereof. Thereupon the court made the following ruling:

> "The objection is overruled provided it will be connected up in that way as suggested by counsel."

Thereupon the document was received in evidence and marked Defendants' Exhibit Three. This evidence was never connected in the manner suggested by counsel for the defendants, or at all.

This ruling of the court was error.

This appears as assignment of error No. IV at page 769 of the Record.

Defendants' Exhibit 3 is not printed in the record but the original has been sent up to this court under order of the District Court. (Record p. 789.)

The offer of the evidence, appellant's objections thereto, and the ruling of the court appear at pages 244, 245 and 246 of the printed record.

X.

Because the court erred in admitting in evidence Defendants' Exhibit Four. This was a tabulated statement offered in evidence by the defendants showing the amount of timber, poles and ties, found by one Roy Wherry and one John Swanson in the cruise made by them for the defendant county in the months of March, April and May, 1916, as compared with the amount of the cruise of M. G. Nease for the defendant county of the same lands, to-wit:

The Southwest of the Northwest, and the Northwest of the Southwest of Section 27, and the Northeast Quarter, the West half of the Southeast Quarter, and the Southeast quarter of the Southeast quarter of Section 34, all in Township 35 North Range 5 E. B.

M. Also the South half of Section 13, all of Section 24, the North half of the Southeast quarter, and the North half of the Southwest quarter of Section 25, the East half of the Northeast quarter, the Northwest quarter of the Northeast quarter, the West half of the Northwest quarter, the Southeast quarter of the Northwest quarter, and all of the South half of Section 26; the Southeast quarter of the Southwest quarter, and the Southwest quarter of the Southeast quarter of Section 33; the North half of the Northwest quarter of Section 34; the North half of the Northwest quarter, and the Southwest quarter of the Northwest quarter, and the West half of the Southwest quarter of Section 35, all in Township 37 north, Range Five E. B. M. The East half of the Southwest quarter, and all of the Southeast quarter of Section 2; the Northeast quarter, the East half of the Northwest quarter, the East half of the Southwest quarter, and all of the Southeast quarter of Section 11. The West half, and the East half of the Northeast quarter, and the Northeast quarter of the Southeast quarter of Section 14. The Northeast quarter, the West half of the Northwest quarter, the West half of the Southwest quarter, and the Southeast quarter of Section 24. The Northeast quarter, the West half of the West half, and all of the Southeast quarter

of Section 25, all in Township 39 North, Range 5 E. B. M.

This statement shows the difference between the amount of each variety of timber found upon each forty-acre tract covered by the statement by Wherry and Swanson and the amount found thereon by Nease's cruiser. For example, it shows that Nease's cruiser found no timber on the East half of Section 34, Township 35 North, Range Five East, and that Mr. Wherry found thereon as follows:

On the Northeast quarter of the Northeast quarter, 15,000 white pine, 220 bull pine, 7,000 white fir, 135,000 red fir and 750 poles;

On the Northwest of the Northeast, 10,000 yellow pine, 120,000 bull pine, 65,000 white fir, 60,000 red fir, and 7,000 poles;

Southwest of the Northeast, 195,000 bull pine, 50,000 white fir, 80,000 red fir, 4,000 poles;

Southeast of the Northeast, 15,000 white pine, 160,000 bull pine, 50,000 white fir, and 155,000 red fir, and 7,500 poles.

Northwest of the Southeast, 10,000 white pine, 110,000 bull pine, 60,000 white fir, 140,000 red fir, 7,000 poles;

Southwest of the Southeast, 45,000 bull pine, 30,000 white fir, 50,000 red fir, 3,000 poles;

Southeast of the Southeast, 15,000 white pine, 10,000 yellow pine, 20,000 bull pine, 30,000 white fir, 85,000 red fir and 4,000 poles.

The statement shows that Nease estimated and reported to Clearwater County white pine upon section 25, township 37 north, range five east, and that Wherry and Swanson found thereon as follows:

Northeast of the Northeast, Nease, 500,000; Wherry, 865,000; Swanson, 880,000.

Northwest of the Northeast, Nease, 600,000; Wherry, 1,155,000; Swanson, 1,115,000.

Southwest of the Northeast, Nease, 500,000; Wherry, 600,000; Swanson, 545,000.

Southeast of the Northeast, Nease, 700,000; Wherry, 780,000; Swanson, 760,000.

Northeast of the Northwest, Nease, 250,000; Wherry, 175,000; Swanson, 185,000.

Northwest of the Northwest, Nease, 250,000; Wherry, 420,000; Swanson, 455,000.

Southwest of the Northwest, Nease, 300,000; Wherry, 700,000; Swanson, 690,000.

Southeast of the Northwest, Nease, 600,000; Wherry, 540,000; Swanson, 540,000.

Northeast of the Southwest, Nease, 350,000; Wherry, 505,000; Swanson, 520,000.

Northwest of the Southwest, Nease, 500,000; Wherry, 615,000; Swanson, 600,000.

Northeast of the Southeast, Nease, 900,000; Wherry, 1,175,000; Swanson, 1,120,000.

Northwest of the Southeast, Nease, 500,000; Wherry, 975,000; Swanson, 915,000.

Southwest of the Southeast, Nease, 500,000; Wherry, 765,000; Swanson, 790,000.

Southeast of the Southeast, Nease, 200,000; Wherry, 245,000; Swanson, 250,000.

The remainder of the statement is of like nature showing differences in varying degrees between the estimates of Wherry and Swanson and the Nease cruiser of timber upon the several forty acres covered by the statement.

The plaintiff by its counsel objected to the statement being received in evidence on the following grounds:

(1) The purpose of the statement offered is to show that the cruise made by Mr. Wherry and Mr.

Swanson in March, April and May, 1916, is at variance with the cruise made by Mr. Nease under his contract and filed with the county. It does not tend to show any collusion or fraud. That the fact, if such it be, that the estimates made by Wherry and Swanson did not agree with the estimates made by Nease's cruise of the same land is not material to any of the issues in this case. The question whether the Nease cruise is in some respects inaccurate is not a matter to be tried in this case.

(2) That under the terms of the contract between Nease and the defendant county, Nease was bound and it was his privilege to recruise and make good any work that the county rejected. If any of Nease's work was faulty the remedy of the county was to require the work to be made good.

(3) After having accepted the work the county could not now relieve itself from such acceptance by showing that some of the work was improperly done.

(4) That the contractor Nease gave a bond to the defendant county for the faithful performance of his work. There is no evidence or claim that there has been any concealment from the county of the character of the work done.

The court overruled the objection and permitted the statement to be received in evidence.

This ruling of the court was error.

This appears as assignment of error No. VI at page 772 of the printed record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at pages 263 and 264 of the printed record. Defendant's Exhibit 4 appears at pages 596 to 623 inclusive of the printed record.

XI.

Because the court erred in admitting in evidence Defendants' Exhibit Number Five, which was a statement offered in evidence by the defendants comparing the amount of timber estimated by Mr. Roy Wherry upon certain lands therein described as compared with the amount reported thereon by M. G. Nease to the defendant county as the result of the cruise by his men of the same lands, to-wit:

The statement shows that Nease estimated and reported to Clearwater County white pine upon sections 25 and 35 in Township 37 North, Range five East, and that Wherry found thereon as follows:

Southwest of the Southwest of Section 25, Nease, 200,000; Wherry, 260,000;

Southeast of the Southwest of Section 25, Nease, 200,000; Wherry, 225,000;

Northwest of the Northeast of Section 35, Nease, 150,000; Wherry, 290,000;

Southwest of the Northeast, Nease, 0; Wherry, 100,000;

Southeast of the Northeast, Nease, 150,000; Wherry, 520,000;

Southeast of the Northwest, Nease, 100,000; Wherry, 75,000.

The remainder of the statement is of like nature showing differences in varying degrees between the estimates of Wherry and Nease's cruiser of timber upon the several forty acres covered by the statement.

The plaintiff objected to the statement being received in evidence upon the same grounds upon which it objected to the introduction of evidence of Defendants' Exhibit Number Four, which are set out in full under specifications of error No. X above. The objection was overruled and the statement was received in evidence and marked Defendants' Exhibit Number Five. This ruling of the court was error.

This appears as assignment of error No. VII at p. 776 of the printed record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 265 of the printed record. Defendants' Exhibit 5 appears at pages 624 to 631 inclusive of the printed record.

XII.

Because the court erred in admitting in evidence Defendants' Exhibit Number Eleven, which is the topographic sketch on the back of the original field report of the witness Roy Wherry of his cruise of Section six, Township 38 North, Range six East, which he made for M. G. Nease, and the original topographic plat of said section turned in by Nease as a part of his report on the same section to Clearwater County.

The plaintiff objected to said documents being received in evidence on the ground that they did not tend to prove anything which is in issue in the case. The court overruled the objection and the said document was received in evidence and marked Defendants' Exhibit Eleven. This ruling of the court was error.

This appears as assignment of error No. VIII at page 778 of the printed record.

Defendants' Exhibit Eleven is not printed in the record but the original has been sent up to this court under order of the District Court. (Record p. 789.)

The evidence offered, appellant's objections thereto and the ruling of the court appear at page 280 of the printed record.

XIII.

Because the court erred in admitting in evidence Defendants' Exhibit Number Eighteen, which was a statement identified by the witness James A. Morrow, showing the comparative results of the cruise of certain lands made by James A. Morrow and the cruise made by Nease for Clearwater County of the same lands, to-wit:

The statement shows that Nease estimated and reported to Clearwater County, white pine upon section 18, township 35 north, range five east, and that Morrow found thereon as follows:

Northeast of the Northeast, Nease, 35,000 yellow pine, 10,000 bull pine, 15,000 white fir, 35,000 red fir, 10,000 tamarack; Morrow, 210,000 yellow pine,

80,000 white fir, 380,000 red fir, 70,000 cedar, 20,000 cedar poles.

Southeast of the Northeast, Nease, 20,000 yellow pine, 10,000 bull pine, 20,000 white fir, 30,000 red fir, 10,000 tamarack; Morrow, 320,000 yellow pine, 170,000 red fir.

Northeast of the Southeast, Nease, 85,000 yellow pine, 50,000 white fir, 65,000 red fir, 90,000 tamarack, 10,000 spruce, 15,000 cedar, 7,000 cedar poles; Morrow, 215,000 yellow pine, 200,000 white fir, 320,000 red fir, 100,000 cedar, 90,000 cedar poles.

Southwest of the Northeast, Nease, 20,000 white pine, 85,000 yellow pine, 120,000 white fir, 85,000 red fir, 25,000 tamarack, 25,000 spruce, 5,000 cedar poles; Morrow, 50,000 yellow pine, 70,000 white fir, 230,000 red fir, 70,000 cedar poles.

Northwest of the Northeast, Nease, 15,000 white pine, 85,000 yellow pine, 125,000 white fir, 80,000 red fir, 20,000 tamarack, 30,000 spruce, 5,000 cedar poles; Morrow, 35,000 white pine, 120,000 yellow pine, 90,000 white fir, 330,000 red fir, 55,000 cedar, 100,000 cedar poles.

Southwest of the Southeast, Nease, 25,000 yellow pine, 120,000 white fir, 90,000 red fir, 100,000 tamarack, 30,000 spruce, 20,000 cedar, 5,000 cedar

poles; Morrow, 140,000 yellow pine, 100,000 white fir, 180,000 red fir, 10,000 cedar, 20,000 cedar poles.

Northwest of the Southeast, Nease, 30,000 yellow pine, 20,000 bull pine, 250,000 white fir, 75,000 red fir, 100,000 tamarack, 25,000 spruce, 15,000 cedar, 5,000 cedar poles; Morrow, 100,000 yellow pine, 90,000 white fir, 240,000 red fir, 25,000 cedar.

Northeast of the Southwest, Nease, 80,000 yellow pine, 45,000 bull pine, 35,000 white fir, 125,000 red fir, 50,000 tamarack, 20,000 spruce, 4,000 cedar poles; Morrow, 20,000 white pine, 65,000 yellow pine, 110,000 white fir, 300,000 red fir.

Southeast of the Southwest, Nease, 60,000 yellow pine, 50,000 bull pine, 100,000 white fir, 175,000 red fir, 155,000 tamarack, 85,000 spruce, 3,000 cedar poles; Morrow, 10,000 white pine, 340,000 yellow pine, 100,000 white fir, 480,000 red fir.

Southwest of the Southwest, Nease, 225,000 yellow pine, 70,000 bull pine, 75,000 white fir, 230,000 red fir, 75,000 tamarack, 15,000 spruce, 7,000 cedar poles; Morrow, 210,000 yellow pine, 70,000 red fir.

Southeast of the Northwest, Nease, 40,000 white pine, 90,000 yellow pine, 90,000 white fir, 150,000 red fir, 10,000 tamarack, 25,000 cedar poles; Morrow, 20,000 white pine, 225,000 yellow pine, 140,000

white fir, 510,000 red fir, 260,000 cedar, 240,000 cedar poles.

The plaintiff objected to the said statement being received in evidence for the reason that a comparison of the cruises made by Mr. Nease and Mr. Morrow upon the same lands was not relevant or material to any of the issues in the case. The objection was overruled by the court and the statement was received in evidence and marked Defendants' Exhibit 18. This ruling of the court was error.

This appears as assignment of error No. IX at page 778 of the record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 285 of the printed record.

Defendants' Exhibit 18 appears at pages 632 to 643 inclusive of the printed record.

XIV.

Because the court erred in admitting in evidence Defendants' Exhibit Number 33 under the following circumstances:

The defendants' counsel propounded the following question to the witness M. G. Nease, a witness for the defendant:

"Have you prepared any statement with reference to the costs of this cruise?"

To which the witness answered: "Some."

Thereupon the defendants' counsel asked the witness Nease the following question:

"Will you produce it?"

The plaintiff then objected to the question and to the reception of any evidence of the cost of the witness Nease of the cruise on the ground that such cost was irrelevant and immaterial to any of the issues in the case and would not in any way tend to prove what was a reasonable contract price for the work. The court then overruled the objection and the witness Nease produced a statement of the amounts paid by him to his cruisers and compassmen when employed in the work of cruising for the defendant county and the defendants' counsel then offered the same in evidence. The plaintiff by its counsel objected to the reception of the said statement in evidence on the ground that the same did not tend to prove any of the issues in the case, did not tend to prove whether the contract was entered into in good faith and did not tend to show what was a fair contract price for the work. The court then overruled the objection and the state-

ment was received in evidence and marked Defendants' Exhibit Number 33.

The ruling of the court in admitting the statement in evidence was error.

This appears as assignment of error No. XI at page 781 of the record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 330 and 331 of the printed record.

Defendants' Exhibit No. 33 appears at pages 669 to 674 inclusive of the printed record, and is a tabulated statement showing the amount paid by Nease to each of his cruisers and compassmen, and the number of days each was employed for work done under his contract with defendant county.

XV.

Because the court erred in admitting any evidence in regard to the cost to M. G. Nease of the work done by him for the defendant county under his contract with it.

This appears as assignment of error No. XII at page 782 of the record.

The court, at the request of appellant, ruled that objection made to the receiving in evidence

of Defendants' Exhibit 33 should be understood as urged to all enquiry into the cost of the work. (Printed Record p. 331.) This avoided taking the time of the court in needless repetition of the objection and is sufficient to save the objection to all such evidence in this court.

XVI.

Because the court erred in overruling the objection of the plaintiff to the following question asked by the defendants' counsel of the witness L. E. Albright, a witness for the defendant:

> "How many times did Mr. Weir pass through each forty while you were working with him?"

The plaintiff objected to this question and to the witness answering the same on the ground that the evidence sought to be adduced was incompetent, irrelevant and immaterial and did not tend to show that the transaction in question was not in good faith nor tend to impeach the contract sued upon. And the plaintiff's counsel then requested that the objection might be understood as going to all evidence offered for the same purpose; and the court ruled that it would be so understood and thereupon overruled the objection; and the witness answered:

> "A double run for about a week and a single run the balance of the time."

This ruling of the court was error.

This appears as assignment of error No. XIII at page 782 of the record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 365 of the printed record.

XVII.

Because the court erred in admitting in evidence Defendants' Exhibit Number 35, which was the field book used by the witness L. E. Albright in his work with the witness Roy Wherry and the witness John Swanson in their doing check cruising for the defendant county in the months of March, April and May, 1916. This book was offered in evidence by the defendants' counsel and the plaintiff objected to the same being received in evidence upon the same ground that the plaintiff had theretofore objected to the evidence of the work done by the witness Wherry and the witness Swanson and especially Defendants' Exhibits Four and Five and particularly upon the ground that there was no issue in the case on trial as to whether Nease's work had been accurately or inaccurately done, and that if any of the work done by Nease for the defendant county was inaccurate, the remedy of the

county was to require Nease under the terms of his contract to make good the work. The court overruled the objections and the field book was thereupon received in evidence and marked Defendants' Exhibit 35. This ruling of the court was error.

This appears as assignment of error No. XV at page 783 of the record.

The offer of the evidence, appellant's objections thereto and the ruling of the court appear at page 368 of the printed record.

This field book was used by the witness in his work as compassman and shows some discrepancies between the topography, as shown by Nease's work and that of witness. An inspection of the book will show that it is impracticable to set out here more fully the substance of this evidence.

XVIII.

Because the court erred in admitting over the objection of the plaintiff any evidence as to the character or inaccuracy of the work furnished and done by M. G. Nease in performance of his contract with the defendant county dated April 15, 1914.

This appears as assignment of error No. XIV at page 783 of the record.

The printed record, at page 266, shows that objection was made and understood to extend to all evidence of this character.

ARGUMENT.

Specification of Error No. I.

The argument in support of this specification is embodied in the argument under the following specifications of error, wherein the reasons why it was error for the District Court to dismiss the plaintiff's bill are set forth with particularity.

Specification of Error No. II.

This specification is that the court erred, and the decree was erroneous, in that the court did not decree that each of appellant's warrants was a valid obligation of the defendant county.

(A) The fact that under the contract between M. G. Nease and Clearwater County the persons who were to perform and did perform the work of cruising were neither assessors, deputy assessors, nor other officers of the county did not render the contract invalid, nor the warrants issued in payment of the work done thereunder, void.

This point challenges the correctness of one of the two grounds upon which, as shown by the District Court's opinion, it held the warrants invalid.

It is conceded that the cruise was made for the use of the assessor and the board of equalization in assessing the timber lands of the county for the purposes of taxation. The proceedings taken by the board of county commissioners in entering into the contract plainly shows this. (Plfs. Ex. 3; Record pp. 479 to 494 inclusive.)

It is clear that the value of timber land for assessment purposes, as well as other purposes, depends upon the amount and quality of timber and the practicability of logging it. That it is necessary to cruise timber lands in order to determine these facts, must also be admitted. This work can be done only by persons skilled and expert in that work. The question then is: must the work of procuring this information be done by the assessor himself or his deputies, or may it be done by other persons hired by the county commissioners for that purpose?

The laws of Idaho, which were relied upon in the District Court will doubtless be relied upon in this court to sustain the contention that this work must be done by the assessor or his deputies and by no one else, and are as follows:

Section 6 of Article 18, Constitution of the State of Idaho:

"The Legislature by general and uniform laws shall provide for the election biennially in each of the several counties of the state * * * a county assessor, who is ex-officio tax collector. * * *"

Section 2119 of the Revised Codes of Idaho, as amended by Chapter 127 of the Laws of 1913 (page 474):

"The sheriff, assessor * * * shall be empowered by the board of county commissioners to appoint such clerical assistance as the business of their office may require, and deputies to receive such remuneration as may be fixed by said board of county commissioners, which remuneration shall be paid quarterly in the same manner as the salaries of the county officers are paid: PROVIDED, that any of the officers mentioned in this section requiring the services of one or more deputies or requiring clerical assistance shall, for a period of at least thirty days before any regular meeting of the board of county commissioners, publish a notice in some newspaper at the county seat, or if no newspaper is published at the county seat, then in some other newspaper published in the county or if no newspaper be published in the county, then by posting a notice in his office for a period of thirty days before said regular meeting, of his intention to apply to the board of county commissioners for a deputy or deputies or for clerical assistance, and no deputy shall be appointed or clerical assistance allowed by said board until due proof of the publication of said notice shall have been furnished said board and the necessity for said assistance is satisfactorily shown, and any taxpayer in

the county shall have a right to appear before said board and protest against said appointment and show cause why said assistance should not be allowed."

The following constitutional provisions of Idaho are also pertinent:

Article 7 contains the following provisions:

SECTION 2. "The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article herein otherwise provided." * * *

SECTION 3. "The word 'property' as herein used shall be defined and classified by law."

SECTION 5. "All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

SECTION 12. * * * The board of county commissioners for the several counties of the state, shall constitute boards of equalization for their respective counties, whose duties it shall be to equalize the value of the taxable property in the county, under such rules and regulations as shall be prescribed by law."

The legislature of Idaho passed in 1913 a very complete act regulating the assessment and taxation of property. This act is Chapter 58 of the Session Laws of that year. Many of the provisions of that

act bear upon the question. As the pertinent sections are numerous and lengthy, and will be frequently referred to in this brief we printed them at the end of this brief as appendix I.

The above Chapter 58 of the Session Laws of 1913 enacted a much more complete system of assessment and taxation than theretofore existed. A cursory examination of the statute as it theretofore existed shows this to be true. (See Title 10, Vol. 1, Idaho Revised Codes, p. 725 *et seq.*) There was little in the previous law governing the manner in which the assessor should assess real estate except Sections 1652 and 1654 of Vol. 1, Idaho Revised Codes, p. 731, which are as follows:

> SECTION 1652. "All taxable property must be assessed at its full cash value; lands and improvements thereon must be assessed separately."
>
> SECTION 1654. "Real estate, and improvements thereon * * * shall be assessed by the assessor of the county * * * in which such property is situated."

The duties of the assessor in the assessment of lands under the statute of 1913 are briefly as follows:

(1) To assess the lands at their full cash value. (Sec. 2.)

(2) Timber lands must be placed in a class by themselves. (Sec. 48B; Sec. 49.)

(3) In the valuation of the timber lands the value of the timber must be included, not as a separate item, but as an element in the valuation of the land. (Sec. 6.)

(4) In cases where standing timber is owned separately from the ownership of the land on which it stands it shall be assessed separately. (Sec. 50.)

The whole responsibility for the proper classification and assessment of lands does not rest upon the assessor. The duties of the board of county commissioners are fully as great, if not greater, than those of the assessor. Briefly, they are as follows:

(1) To enforce and compel a proper classification and assessment of all property required to be entered upon the real property assessment roll. (Secs. 55, 56.)

(2) For the above purpose the board is required to examine the roll, tract by tract, and name by name, and the valuation of each item of property assessed, and to raise or cause to be raised, lower or cause to be lowered the assessment of any property which, in the judgment of the board, has not been assessed at its full cash value. (Sec. 56.)

(3) To determine all complaints in regard to the assessed value of any property entered upon the roll. (Sec. 56.)

(4) Except as prohibited in the act, to correct any valuation entered upon the roll by adding thereto or subtracting therefrom such amount as may be necessary in order to make such valuation conform to the full cash value. (Sec. 56.)

(5) To correct any assessment by adding to or subtracting from the amount, number, quantity or value of any property assessed when a false, incorrect or incomplete taxpayer's statement has been rendered. (Sec. 56.)

(6) The board may require the attendance before the board of any other county officers for the purpose of furnishing information; may subpoena witnesses and hear evidence in all matters relating to the assessment of property. (Sec. 62.)

(7) The changes in assessments and all new assessments ordered by the board shall be entered on the roll, and shall have the same force and effect as if made and entered by the assessor in the first instance. (Sec. 58.)

The statute further provides that:

(1) Any county officer upon whom any duties

devolve under the act or the revenue laws of the state who wilfully neglects to perform such duty or who performs them in a careless or incompetent manner may be removed from office. (Sec. 211.)

(2) Any assessor or commmissioner who wilfully or knowingly enters or suffers to be entered any untrue or incorrect classification of land is penalized in the sum of $1,000.00. (Sec. 68.)

The full responsibility for seeing that all lands within the county are correctly classified and assessed rests both on the assessor and on the board of county commissioners. The legislative intent is manifest to encourage and indeed require a thorough, competent, careful and uniform classification and assessment of all lands. It is much more thoroughgoing in its requirements than any previous law of the State of Idaho. Careless and incompetent assessments and classifications are directly condemned.

On the other hand, it is clearly manifest that the legislature did not intend to prescribe or limit the means by which such a competent, careful, adequate and uniform assessment and classification should be insured. The manner by which the county officers should accomplish the result required of them was left to their discretion. The legislature

properly realized that the varying conditions of the several counties would call for varied means.

To classify and assess large bodies of timber land such as exist in Clearwater County without any knowledge of the amount, character, quality and logging possibilities of the timber thereon would surely be making such classification in a "careless and incompetent manner."

The District Court was of the opinion that the board of county commissioners was not without authority to incur expense in obtaining information to enable them to intelligently perform these functions (Record p. 190), and we apprehend that the contrary will not be contended.

The position of the respondent county, which was sustained by the District Court, is that the only way in which such information can be procured is by the appointment of a sufficient number of competent timber cruisers as deputy assessors to make the necessary cruise. There is no such express limitation in the statute. It is sought to infer this limitation from the fact that Section 2119, *supra,* of the Revised Codes of Idaho, as amended by Chapter 127 of the Laws of 1913, p. 474, authorizes the appointment of such deputy assessors as the business of the office may require.

It is obvious, however, that this statute, which does nothing more than to provide for deputies, has no bearing on the question. It simply provides for additional persons to do the assessor's work. It cannot be construed to add anything to the official functions which can be performed by the assessor only. If the cruising of timber is an act which, under the law, must be done by the assessor in his official capacity; if the information to be procured by such a cruise can be procured only by the cruise of the assessor himself; then such information must be so procured no matter whether he be empowered to appoint deputies or not.

It remains to consider whether the work done by Nease was work which the law specifically required the assessor to do. We have seen that the statute contains no express prohibition against the procuring of this information by contract with private parties. It has been, and doubtless will be, argued that such a contract is beyond the powers of the commissioners because they cannot hire private parties to do the specific thing which the law requires the officer himself to do. There is no doubt about this principle of law. However, it has no application to the facts of this case. This will be made clear by considering, with praticularity, just

what it is that the assessor is required to do. He is to classify and assess land. His official duty consists in placing upon the rolls, e. g., the N. E. ¼ of the N. E. ¼ of a certain section, as timber lands valued at one thousand dollars. In brief, it consists of three steps: (1) A listing of the lands; (2) a classification; and (3) a valuation. It is undeniably true that in order to make the classification and valuation he must have information. He may have had that information within his own knowledge when he was elected. It is more probable that he will have to acquire it from some source. The law leaves him to get it in any way he can. He may procure it by conversation with his next-door neighbor or from the opinion of acquaintances in the neighborhood of the property, or he may be satisfied with the opinion of the owner. The acquisition of the information is not the assessment nor any part of it. It simply qualifies the assessor to properly perform the official function. The information which enables him to put a proper valuation upon a piece of land, has, as information, no official status. Let us suppose that the assessor should, in person, cruise a section of timber land for the purpose of determining the amount of timber on it to enable him to properly value it. When he has done so, he has simply procured information.

There is no way, under the law, by which that information can be given any official status. It simply guides him in fixing the value. The valuation only is his official act.

This is quite obvious from the fact that the statute neither requires not permits, except as hereafter stated, the timber to be separately listed or valued. When the N. E. ¼ of the N. E. ¼ of a certain section is placed upon the rolls, it is completely listed no matter how much timber it has on it. The knowledge as to the timber is only for the purpose of enabling the land to be properly classified as timber lands, and properly valued. It is information as to the nature and quality of the land as affecting its value. Such information does not differ in kind from information that a piece of land has a coal mine on it. It is information which does not require or permit the assessor to assess this quality, i. e., timber, separately, but does enable him to value the land as a whole correctly.

There is one exception to the above. Where the timber is owned separately from the land, the timber must be entered upon the real property assessment roll separate and apart from the land; but this exception does not affect the argument.

It must be conceded that the assessor himself

cannot be compelled to cruise all the timber lands in Clearwater County. No doubt the assessor of any county in the State of Idaho has the right to cruise all the timber lands in his county for the purpose of enabling him to properly classify and assess them. He is doubtless privileged to do so if he has the ability and the means; but he is not specifically so required.

On this point the Supreme Court of Indiana, in the case of *City of Richmond et al. vs. Dickinson,* 58 N. E., at page 261, said:

> "So it is important not to confuse a privilege or right on the one hand with a duty required by law on the other. Under the statute there is no doubt of the right of the county auditor (city clerk) to procure 'credible information' as best he can, concerning secreted and omitted property. But does the law lay upon him the duty to hunt for omitted property? Must he assume that the returns of the taxpayers are false—not merely the returns for the current year, but for an indefinite period prior to his incumbency? If he intentionally fails or refuses to act upon such an assumption, must he pay a fine, and go to jail? If he must act upon such an assumption to save himself then he is bound at his peril to investigate the correctness of the returns of every taxpayer within his jurisdiction for every year the taxpayer might be liable to taxation on omitted property. But such is not the duty required by statute."

That the county commissioners, being bound

by the statute to enforce a complete and proper classification and assessment, had the power to contract with private persons to procure the information necessary to enable the assessor and themselves properly to classify and assess the lands, is settled by the following authorities:

Prothero vs. Board of Comrs. of Twin Falls Co., 127 Pa. Rep. 175 (Idaho).

Wilhelm vs. Cedar County, 50 Ia. 254.

Disbrow vs. Board of Supervisors of Cass County, 93 N. W. 585 (Ia.).

Shinn vs. Cunningham, 94 N. W. 941 (Ia.).

Reed vs. Cunningham, 96 N. W. 119 (Ia.).

Burnett vs. Markley, 31 Pac. Rep. 1050 (Or.).

Tasker vs. Commissioners of Garrett County, 33 Atl. 407 (Md.), 82 Md. 150.

State ex rel. Herren vs. Hall, 63 Pac. 13 (Or.).

Martin vs. Whitman County, 1 Wash. St. 533.

City of Richmond vs. Dickinson, 58 N. E. 260 (Ind.).

The case of *State vs. Goldthait,* 87 N. E. 133 (Indiana), is a case holding that a contract by county commissioners employing a private person to secure a particular kind of information in regard to property omitted from the assessment roll was invalid. This case, however, is not in conflict with

the other Indiana cases first cited above, nor with the contention of the appellant here. In the *Goldthait* case the contract was condemned because the assessor was specifically required by the statute to do the precise thing, i. e., search the records, that the private party was hired to do. The contract was a direct infringement upon the functions of the assessor. The distinction between that case and the case at bar is clear. In the following cases, similar contracts were condemned:

Grannis vs. Board of Com'rs of Blue Earth County, 83 N. W. 495 (Minnesota).

Chase vs. Board of Com'rs of Boulder County, 86 Pac. 1011 (Colo.).

Stevens vs. Henry County et al., 75 N. E. 1024 (Illinois).

These cases are based upon the fact that no power or duty was imposed upon the commissioners in regard to the assessment of property. The distinction between these cases and the case at bar is apparent.

The lower court, in its opinion, propounds the question: "Assuming that a cruise was needed, why could it not as well have been made under the direction of the assessor, by qualified deputies appointed for that purpose?" Perhaps it could. But we are dealing here, not with a question of policy, but of

power. It may be that the court's judgment as to what should have been done was better than that of the commissioners. But it is not the function of the court to decide whether the county commissioners used good judgment, but whether they had power to exercise their judgment at all.

Nor is there any value in the suggestion that a cruise made by the assessor and his deputy would, when completed, have had the sanction of the law and a legal status. Under the statute, lands must be assessed each year. Information obtained by a cruise by the assessor in one year would have no official status. The only acts of the assessor that have such status are the classification and valuation of the land. The assessor for the following year would be just as free to disregard the cruise of his predecessor as to disregard the cruise of Nease. How a cruise made by the assessor could, under the laws of Idaho, have "the sanction of law and a legal status," as suggested by the District Court, has not been pointed out.

There is an additional reason why the county commissioners have the right to procure this information by having the work done by persons other than the assessor. They are bound, as well as the assessor, to see that the valuation placed upon each

piece of property is correct. They are not bound by the assessor's valuation, nor are they bound by his information. They are specifically authorized to subpoena witnesses, and hear evidence in all matters relating to the assessment of property. (Section 62.) If it is proper that such information should be obtained at all (and this seems to be conceded), then it was certainly within the discretion of the county commissioners to determine whether they could best get it from the assessor or from somebody else. To hold otherwise, and that a cruise made by the assessor would be binding upon them, would be to nullify the powers of the commissioners and leave them wholly at the mercy of the assessor.

The precise question was decided by the United States District Court for the Western District of Washington, which held that a contract by county commissioners with a private person or corporation for the cruising of timber for the purpose of supplying the assessor and board of commissioners with information to be used in the assessment of timber lands does not trespass upon the functions of the county assessor. The contract before the court in that case was the same kind of a contract as that involved in the case at bar. The same objection was made to it as is now under consideration in this

case. In the opinion in that case the District Court said:

> "It is contended on the part of the defendant that the commissioners are powerless to enter into such a contract, and that they are trespassing upon the functions of the county assessor, because the information to be adduced by the plaintiff was work which should be done by the county assessor, and that the county assessor had the right under the law to select his deputies, and the commissioners only have the right to fix the compensation.
>
> "While it may be true that the information which is sought by this contract is information which undoubtedly was for the purposes of the county assessor's office, it likewise was information which the county commissioners necessarily must have in order to fully and properly discharge the duties of the board in equalizing the assessments of the county (sections 9200-9207, Remington & Ballinger's Codes of Washington), as a basis for the levy for taxes. The county commissioners are not concluded by the valuations placed upon property by the county assessor, nor is the assessor bound by the valuations fixed by plaintiff. The timber lands in this country are of such a character, and the value of timber is a matter which is not within the common knowledge of citizens, and under the system of listing and assessing property it is practically impossible for the assessor to list and assess the timber upon lands in his county without aid given by persons who have special knowledge or qualifications. The proper administration of the business of the county is through its authorized administrators, the county commissioners, upon whom must fall the burden of securing the expert information

which cannot be obtained otherwise. *Burnett vs. Markley,* 23 Or. 436."

Pacific Timber Cruising Co. vs. Clarke County, Wash., 233 Fed. 540.

(B) NEITHER THE CONTRACT BETWEEN CLEARWATER COUNTY AND M. G. NEASE, NOR THE PERFORMANCE THEREOF BY NEASE, NOR THE ISSUANCE TO NEASE IN CONSIDERATION OF SUCH PERFORMANCE, OF THE WARRANTS NOW HELD BY THE APPELLANT AND UPON WHICH THIS SUIT WAS BROUGHT, WAS IN VIOLATION OF SECTION 3 OF ARTICLE 8 OF THE CONSTITUTION OF IDAHO.

This is the principal question in this case. In fact it is the controlling question.

Section 3 of Article 8 of the Constitution of Idaho is as follows:

"No county, city, town, township, board of education, or school district, or other subdivision of the State shall incur any indebtedness, or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same Any indebtedness or liability incurred contrary

to this provision shall be void; *Provided, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the State.*" (Italics ours.)

This section is taken from Art. XII, Sec. 18 of the constitution of 1879 of the State of California. However, the section, as it appears in the California constitution, does not contain the proviso which occurs in the Idaho constitution. Since the question involved is the proper construction of the proviso, no help can be expected from the decisions of the California courts.

It is conceded by the appellant that the indebtedness in question was incurred without the assent of the electors at an election held for that purpose. It is further conceded that at the time of incurring such indebtedness, no provision was made for the collection of the annual tax sufficient to pay the interest on the indebtedness, and to constitute a sinking fund for the payment of the principal; and it is further conceded that such indebtedness exceeded the income and revenue for the year in which it was incurred.

Therefore, the question is, whether the indebtedness in question falls within the terms of the proviso. In other words, was the purpose for which it was incurred "ordinary and necessary

expenses authorized by the general laws of the State?'' If the indebtedness in question was not such an ordinary and necessary expense, it is invalid. If it was such an ordinary and necessary expense, it is valid.

The question has been squarely decided by the Supreme Court of Oregon, in the case of *Wingate vs. Clatsop County,* 71 Ore. 94; 142 Pac. 561. This case involved the question of the validity of a debt against Clatsop county, incurred for the cruising of timber of that county for assessment purposes under a contract substantially identical with the one at bar. It was claimed in that case that the indebtedness was in violation of section 10 of article 11 of the constitution of Oregon, as amended in 1911. This section is as follows:

> ''No county shall create any debts or liabilities which shall singly or in the aggregate exceed the sum of five thousand dollars, except to suppress insurrection, or repel invasion, or to build permanent roads within the county, but debts for permanent roads shall be incurred only on approval of a majority of those voting on the question.''

The difference between the Idaho constitution and the Oregon constitution is this: Under the Oregon constitution no debt can be created above $5,000.00, except to suppress insurrection, or repel

invasion, or to build permanent roads. Except for the specified purposes, the prohibition against any indebtedness above $5,000.00 is absolute. Under the Idaho constitution any indebtedness in excess of the annual revenue is prohibited, except for ordinary and necessary expenses. There is no limitation on indebtedness for ordinary and necessary expenses.

It is quite obvious, therefore, that the constitution of Oregon is, at least, as severe in its prohibition as the constitution of Idaho. Nevertheless the Supreme Court of Oregon held, in the *Wingate* case, that an indebtedness incurred by Clatsop county, for the cruising of timber for assessment purposes, was not within the prohibition of section 10 of article 11 of the constitution of Oregon.

Moreover, the statutes of Oregon governing assessments are not so drastic as the statutes of Idaho in imposing a duty upon the assessor and board of equalization to see to it that a competent, careful, classification and assessment is made. The duties of the assessor and board of equalization, under the Oregon law, are set forth in sections 3586, 3605-3608-3609 of Lord's Oregon Laws, and are set forth in appendix II to this brief at page 135. If, under the Oregon constitution and statutes, a debt incurred for cruising timber, to enable the

assessor and board of equalization to properly assess the land, is a debt incurred in carrying out the duties imposed upon the county by law, then certainly a like debt incurred by a county under the constitution of Idaho is "an ordinary and necessary expense authorized by the laws of the State." In fact, the warrants in the case at bar, under the authority of the *Wingate* case, would be valid irrespective of the saving force of the proviso in the Idaho constitution.

(a) The indebtedness in question was a necessary expense within the meaning of the proviso. It may be, as stated by the District Court in its opinion, (Record pp. 194-195) that this proviso is so incapable of precise construction as to leave a deplorable element of uncertainty in the fundamental law, and that the courts cannot be expected to make specific that which the constitution has left general. Undoubtedly the makers of the constitution had no intention of imposing on the courts any such burden. They must have realized also that the terms which they were using were general, and that by the use of them they were conferring general powers upon the political department of the government.

The term "necessary," as applied to a county

expense, includes any means reasonably calculated to produce the end.

Cotton vs. Com'rs, 6 Fla. pp. 629-630.

The end sought to be accomplished in the case at bar was the proper and careful classification and assessment of lands. This end was "authorized by law" within the meaning of the proviso in question. It follows that an expense reasonably calculated to produce such authorized end was a "necessary expense authorized by the general laws of the State."

That it is necessary that the assessment of property for taxation shall be uniform must be conceded. Article VII, section 5, of the constitution of Idaho so requires. The statute also so requires. (Chapter 58, Session Laws of Idaho, for the year 1913, sections 39, 56. The statute also requires that all property shall be assessed at its full cash value, as near as practicable, and shall be classified. (Chapter 58, Session Laws of Idaho, 1913, sections 39, 48, 49, 56. (See appendix I, page 126, this brief.)

The statute requires the board of county commissioners to enforce a proper classification and assessment according to the provisions of the act. (See section 56, appendix to this brief, page 130.) The act especially condemns the performance of this work in a careless and incompetent manner.

(See section 211, appendix to this brief, page 132.)

It is obvious that lands cannot be either classified or valued for assessment as required by this act, unless the assessing officers know whether it is timber land, and if so, the quantity, character, and quality of the timber. It is common knowledge that the amount, character, and quality of the timber is the chief determining factor in the valuation of timber lands. The difficulties which the officers of Clearwater county had encountered in attempting to assess such lands without such knowledge is shown by the testimony of P. H. Blake, who was assessor of the county at the time the Nease contract was entered into. (Record pp. 413, 414, 416, 417, 418, 419.) This was further shown by the testimony of the witness Harrison, who was one of the county commissioners at that time; (Record pp. 301 to 304) and of the witness Zelenka, who was also one of the commissioners at that time. (Record p. 361.) If the assessing officers could not make such an assessment as the law required without this information they surely were "authorized" to procure it.

(b) The indebtedness incurred was an ordinary expense within the meaning of the proviso. If it be conceded that the information in regard to the

quantity, quality, and character of the timber was necessary to make a valuation of the timber land, then the county commissioners were authorized to meet that necessity, i. e., get that information in the ordinary way. What is the ordinary way of finding out the quantity, character, and quality of timber upon lands? A cruise is not only the ordinary method, but it is the only known method. It follows that an expense incurred by the county commissioners in getting this information by a cruise was an ordinary expense as well as a necessary expense. The mere fact that the county had not theretofore been meeting this necessity—that it had not been making a careful and competent assessment of its timber lands, as the law required,—does not show that the way in which they did meet it, when they finally determined to meet it, did not constitute an ordinary expense. *An ordinary expense is one that meets a necessity in the ordinary way.* So far as we have been able to determine, the term ordinary expense, as applied to governmental expenditures, has not frequently been the subject of judicial construction. It has been held, however, that it cannot mean less than the necessary expenses incurred in administering the government of the county under the statutes relating thereto in such a manner as will best carry out the obligations imposed upon

the county by law.

Mills vs. Township of Richland, 40 N. W. 183 (Mich.).

Intendant & Town Council of Livingston vs. Pippin, 31 Ala. 542.

The mere fact that the expense does not frequently recur or, in fact, occurs but once does not make it an extraordinary expense.

Hickey vs. City of Nampa, 22 Idaho, 41, 124 Pac. 280.

The practical value of such a cruise as was made by Nease is shown by the use made of a like cruise in the State of Oregon as appears from the case of *In re Weyerhaeuser Land Company,* decided by the Supreme Court of Oregon, since the decision of this case and reported in 165 Pac. Rep. at page 1164.

(c) It may not be amiss to notice with more particularity the reasons advanced by the trial court for holding the expense not to be an ordinary or necessary expense:

1. One reason which the District Court assigns is that the statute requires the assessor to determine the full cash value of land only "as near as practicable," and that inasmuch as absolute accuracy is unattainable the assessing officers "are to do the best they can with the means at their disposal to

approximate, as near as may be, the unattainable ideal." (Record pp. 197 to 201.)

The fault with this argument is that the conclusion does not follow from the premise. The requirement that the assessing officers find the true cash value "as near as practicable" means, if it means anything, that they are to do the best they can after exercising all the powers at their command. The fact that they cannot attain absolute accuracy does not relieve them from the obligation of doing the best they can. To say that they must do the best they can "with the means at their disposal" begs the question, for the question is:—What means are at their disposal? The conclusion of the court is that although the necessity rests upon the commissioners to see to it that a careful and competent assessment is made, there is no necessity for them to employ the means which will enable them to do it.

2. Another reason which the District Court assigns is that an expense incurred by the county commissioners to enable them to more efficiently perform their duty by having a proper classification and assessment, as required by the statute, is not an ordinary and necessary expense because it was the intention of the Idaho constitution to adopt a

policy which "entails a measure of crudity and inefficiency in local government," thinking it best "to sacrifice a measure of efficiency for a degree of safety." (Record pp. 201-202.) In other words, as applied to the case at bar, the reasoning of the District Court is that it was the intention of the constitution to forbid the county commissioners to create debts in excess of the current revenues, and, at the same time, to enforce upon them the necessity of continuing an outworn and inefficient system of getting in the revenue. This is an unwarranted construction. It may be, as stated by the District Court, that the Idaho constitution is imbued with the spirit of economy. But it is equally true that specific authority is given to the county commissioners to incur debts for any ordinary and necessary expense that is authorized by law. It is also true that the Legislature has required them to make a careful and competent assessment of all property. The Legislature had undoubted power to so require. The Legislature has, to this extent at least, put its disapproval upon the continuance of crudity and inefficiency in local government. It would seem, therefore, that an expense incurred by the county commissioners to enable them to perform this duty is a necessary expense "authorized by law," within the meaning of the proviso of the constitution.

3. The District Court also suggests that the indebtedness in question is not a necessary and ordinary expense, because neither the assessor, nor the county commissioners would be guilty of a misdemeanor under sections 64 and 68 of the Act, nor could they be proceeded against under section 211 of the Act, if they failed to have a cruise made ; (Record p. 200) nor could they be proceeded against by mandamus to compel them to do so. (Record p. 206.) Without stopping to inquire whether they could be so punished, we submit that mandamus would lie against the commissioners to compel them to take the steps necessary to enable them to make such an assessment as the law requires.

Harris vs. State, 34 S. W. 1017 (Tenn.).

State Board of Equalization vs. People ex rel. Goggin, 58 L. R. A. 513, (Ill.).

Hyatt vs. Allen, 54 Cal. 353.

People vs. Shearer, 30 Cal. 645.

People ex rel. Geneva vs. Board of Supervisors of Ontona Co., 100 N. Y. Sup. 330.

It would be more pertinent to inquire whether the assessor could be compelled by mandamus to make a classification and valuation of lands as required by the statute unless, and until, the commissioners, upon whom the duty rests to see to it

that such classification and valuation is made, furnished him either with the information necessary to enable him to do so or the necessary means to procure such information.

Harris vs. State, supra.

But whether mandamus would or would not lie is a question not necessary to the decision of this case. The county commissioners were surely bound to procure the information necessary to enable them to do their duty. If there were several ways in which they could get the necessary information it would rest in their discretion to take whichever way to them seemed best and, under such circumstances, mandamus would not lie to compel them to pursue any particular method. But it does not follow that because they could not be compelled by mandamus to get the information in any particular way it was not necessary for them to get it at all.

4. The District Court relied upon the cases of *Bannock County vs. C. Bunting & Co.,* 4 Idaho, 156, 37 Pac. 277; *Dunbar vs. Board of Com'rs,* 5 Idaho 409, 49 Pac. 409. In the *Bunting* case the Supreme Court of Idaho held that an indebtedness incurred for the purchase of a court house site was not an ordinary expense; but that ruling is based upon the statute prescribing the procedure to be

taken for the erection of courthouses which, in the language of the Supreme Court,

> "clearly indicates that the legislature did not consider this an ordinary expense of the county, as the section makes special provision for erecting courthouse, jail, and other public buildings, as follows: * * *; thus indicating beyond question that the construction of courthouses, jails, and other public buildings was an extraordinary expenditure."

In the *Dunbar* case, the Supreme Court of Idaho made the same ruling in regard to a bridge, but under the same statute.

5. It was also suggested by the District Court that if this contract can be sustained, another of like character for a second cruise can be made at any time. (Record p. 204.) It may be that changes in the condition of the timbered sections of the county will occur, chiefly from the cutting of timber in logging operations. It will be a simple matter for the assessing officers to make such corrections in the cruise as such changed conditions shall entail, and at a very small expense. But we fail to see how it follows that, because the necessity now exists for the obtaining of information not now at hand, a like necessity will exist for procuring the same information after it has been obtained.

6. There is another objection made to the va-

lidity of the warrants in question which rests upon an entirely different footing from any of the other objections made. This objection is based upon the following facts:

The contract between the defendant county and Nease provides for the cruising of "all the timber on patented lands situated in Clearwater County, Idaho." (See paragraph 1 of the contract; Record p. 96.)

There were a certain amount of lands cruised and included in the estimates for which the warrants were issued which were not timbered. There were also cruised and included in the estimates, for which warrants were issued, a certain amount of lands that were not patented. A part of these unpatented lands belonged to the United States Government and a part to the State of Idaho. It was claimed by the defendants, and was so held by the District Court, that whatever might be held in regard to the necessity of cruising patented timber lands, there was certainly no necessity for cruising the unpatented or untimbered lands. The amount of patented untimbered lands so cruised and charged for was 28,082.79 acres. (Recond pp. 644-646, 288.) The reason for the cruising of these untimbered lands is that there were lying within those portions of the

county which were timbered, tracts of clear, burned, or bare land; and they were included in the estimates made, for the purpose of enabling the assessing officers to properly classify such lands as untimbered lands or cut over, or burnt timber lands, as required by section 48 of Chapter 58 Session Laws 1913; and also for the purpose of enabling the assessing officers to properly judge of the claims of timber owners in regard to the amount of lands in the timber belt, which had been cut over, or which for any other reason were untimbered. (See testimony of Zelenka, Record pp. 361 and 364; and testimony of Blake, Record pp. 419, 420; and testimony of Harrison, at pp. 303, 304.) While it may be true that the necessity for cruising these lands was not so great as the necessity for cruising lands actually timbered, yet we submit that when taken in consideration with the whole work done and the objects and purposes of the cruise, the inclusion of these lands was not sufficient to make the debt incurred for cruising them violative of the constitutional provisions.

The lands belonging to the United States Government which were cruised were cruised under an understanding between Nease and the county commissioners for the following reasons: small tracts

of government lands, e. g., forty acres or eighty acres, lay isolated in large tracts of patented timber lands. It seemed to the board of county commissioners that these lands were either in process of passing to private ownership or soon would be. It seemed to them that it was good business to include them in the cruise to avoid the necessity in the future of making cruises at greatly increased expense, of these isolated tracts. (See testimony of Harrison, Record pp. 297, 298; testimony of Zelenka, Record p. 356; testimony of Blake, Record pp. 418, 421; testimony of Nease, Record pp. 324, 343.)

That this was not done to swell the amount of lands to be cruised, but in good faith, is shown by the fact that the county took advantage of its right under the contract to withdraw timber lands from its operation, and actually withdrew a large amount of timber lands concerning which it already had what it considered to be sufficient information. (Record pp. 363, 418, 419.)

While it may be true that this anticipatory cruise, standing alone, would not be a present necessity, nevertheless when taken in connection with the whole transaction, the indebtedness created by the cruising of these lands is not violative of the constitutional provision in question.

The total amount of the state lands cruised was 6,165.46 acres. (See testimony of Becker, Record p. 396.)

It was not the intention that any non-taxable state lands should be cruised. Two thousand and eighty acres of these state lands had, however, been sold under contract to private individuals. (See Plfs' Ex. 28, Record pp. 583, 591.) These were taxable either as land or timber under Sections 6 and 38, Chapter 58 of the Session Laws of 1913, and Section 1586 of Idaho Revised Codes, Vol. 1, and therefore properly cruisable. (See testimony of Becker, Record p. 396.) The balance of the state lands cruised, amounting to 4,085.46 acres, were included through the mistake of the county commissioners in including them in the list of lands given to Nease to cruise. (See testimony of Nease, Record p. 343.) Nease cruised no state lands except such lands as he was told to cruise by the county commissioners. The inclusion of the taxable state lands was no more violative of the constitutional provision than the cruising of the patented lands.

If the county requested by mistake certain lands to be cruised which were non-taxable, this incidental mistake in the execution of the contract would not render the expense incurred for the cruising of such

lands invalid if the main purpose of the contract was valid.

However, if this court should hold that the cruising of any of the untimbered, government, or state, lands did not create a valid debt against the county, this would not render the debt incurred for cruising of the patented timber lands invalid. This court will, if it considers any part of the indebtedness invalid, reduce the appellant's claim by that amount. The facts necessary for the court to make such deduction are in the record.

The whole amount of unpatented lands, (State and United States Government lands) is 34,386.37 acres. (See defendants' exhibit 19, Record pp. 644, 647.) The whole amount of state lands was 6,165.46 acres. (Record p. 396.) The difference between these two amounts gives the amount of United States Government lands as 28,220.91 acres.

The entire amount of patented untimbered lands (28,082.79 acres; See defendants' Ex. 19, Record pp. 644, 647); non-taxable state lands (4,085.46 acres); and United States Government lands (28,220.91 acres) is 60,389.16 acres. This is the amount of land the cruise of which, it is claimed, cannot be justified as a necessary expense.

However, 8,190.26 acres of the government lands were under live homestead entries at the time they were cruised, and 2,723,14 acres have since been patented. (Record p. 405.) If these 8,190.26 acres are held properly cruisable, then the amount of 60,389.16 acres should be reduced by that amount, leaving 52,198.90 acres. We believe the above computations are correct.

If there is any error we should be glad to have it pointed out by the appellees. However, neither all of the untimbered lands cruised nor all of the United States Government lands cruised, nor all of the non-taxable state lands cruised can be charged to the plaintiff and deducted from its claim in case any deduction is made, because $18,926.99 of the warrants issued to Nease under his contract were sold by him to the Empire National Bank and, on January 9th, 1915, paid by the Treasurer of Clearwater County. (Record p. 344; Par. 27 of the answer; Record p. 40.) The warrants so paid were issued for 80% of the amount due Nease for the two bills first filed by him with the county, as shown by plaintiff's exhibit No. 4; Record p. 495, and plaintiff's exhibit No. 6, Record p. 520. (See also testimony of Nease, Record pp. 322 and 344.)

The testimony of the witness Nease as it ap-

pears on page 344 of the record is erroneous in stating that the warrants were issued for the bills; plaintiff's exhibits 6 and 7. They were issued for the first bills rendered which are plaintiff's exhibits 4 and 6. This error is apparent because 80% of plaintiff's exhibits 4 and 6 amount to the exact amount of the warrants paid to the Empire National Bank.

The amount of United States Government lands covered by these two first bills is 9,746.98 acres. This result is obtained by comparing defendants' exhibit 20, which shows the whole amount and the description of the government lands cruised, with plaintiff's exhibits 4 and 6 (Record pp. 495, 520) which shows the description of all the lands cruised and covered by the first two bills. Plaintiff's exhibit 20 is not printed in the record but the original has been sent up.

The amount of non-taxable state lands covered by these first two bills is 1,412.94 acres. This result is obtained by comparing plaintiff's exhibit 28 (Record pp. 583 to 591), which shows the whole amount and description of non-taxable state lands cruised, with plaintiff's exhibits 4 and 6.

The amount of patented untimbered lands covered by the first two bills is 14,123.80 acres.

This result is obtained by comparing defendants' exhibit 19 (Record p. 644), which shows in the third column thereof the amount of untimbered patented lands cruised in each township, with plaintiff's exhibits 4 and 6.

The whole amount of patented untimbered lands, government lands, and non-taxable state lands, which were cruised and covered by the first two bills is 25,283.72 acres. At the contract price of 12½ cents per acre this would total $3,160.46. Eighty per cent of this amount was covered by the warrants issued at the time the bills were allowed and warrants for which were sold to the Empire National Bank, and paid by the county. Eighty per cent of this amount is $2,528.36.

Therefore, if any deduction is to be made from the county's liability on account of the cruise of untimbered patented as well as government lands and state lands, $2,528.36 of that amount is chargeable to the Empire National Bank and not to the appellant. And if a deduction is to be made for any one of these classes of lands it should be made on the basis of 80% of the contract price for the number of acres of such class of land included in the first two bills as shown above.

We believe that the above computation is cor-

rect, and if there is any error therein we shall be glad to have it pointed out by the appellees.

When we have spoken of patented untimbered lands we have included only such lands as were reported to have no timber upon a governmental subdivision of 40 acres. We did not include any untimbered lands included in a 40 acre tract which was partly timbered.

If, however, this court should find that a deduction should be made from the plaintiff's claim, and that the amount of such deduction cannot be determined from the record before it, the District Court can make such deduction under the directions of this court.

It could be determined from this record, if deemed necessary, how much of the cruised, untimbered, government, and state, lands were included in each of Nease's bills filed with the county, and a proportionate reduction made from each of the batch of warrants issued for each bill. This is unnecessary. If any such reduction is to be made the appellant consents that it may be made by the cancellation of a sufficient number of the warrants to effect the reduction, and that such warrants may be taken from the highest or lowest number. If

any odd sum remains the same can be endorsed upon any remaining warrants as a payment.

The above covers the grounds which, the District Court stated in the opinion rendered to be the basis of its judgment. We now notice the other objections of the defendants to the validity of the warrants.

(C) The warrants are in the form required by the laws of Idaho.

The objection raised to the warrants is that they do not specify the liability for which they were drawn nor when it accrued as required by Sections 1955 and 2053 of Idaho Revised Codes of 1908, Vol. 1. These sections are as follows:

> "Section 1955. Warrants drawn by order of the commissioners on the county treasury for current expenses during each year, must specify, the liability for which they are drawn, and when they accrued, and must be paid in the order of presentation to the treasurer. If the fund is insufficient to pay any warrant, it must be registered and thereafter paid in the order of its registration."
>
> "Section 2053. All warrants must distinctly specify the liability for which they are drawn, and when it accrued."

(a) The warrants do specify the liability for which they were drawn.

Not all of the warrants are printed in the record. Copies of all of them, however, are included in plaintiff's Exhibit No. 1, the original of which has been sent up under the order of the District Court. (Record p. 789.) Three of the warrants are printed in the record as samples, and appear at pages 593, 594, 595 of the printed record. The warrant appearing on page 593 of the printed record shows on its face that it was drawn "for cruising". The warrant appearing on page 594 of the printed record shows upon its face that it was drawn for "cruising as per contract". The warrant appearing on page 595 of the printed record shows upon its face that it was drawn "for cruising timber". Each of the warrants in controversy is in the form of one of the three printed in the record. All of them sufficiently specify the liability for which they were drawn.

(b) The warrants do specify when the liability for which they were drawn accrued.

This court had before it the question of the validity of warrants of Bingham county, Idaho, in the case of *Bingham County vs. Nat. Bank of Ogden,* 122 Fed. p. 16. In that case the warrants in controversy were drawn in the years 1893 to 1896. This court held in that case that the warrants were

invalid because they did not specify when the liability for which they were drawn accrued. This case was followed by the Supreme Court of Idaho in the case of *McNutt vs. Lemhi Co.,* 84 Pac. Rep. 1054, 12 Idaho 63. The evident purpose of the statutory requirement that each warrant must show when the liability for which it was drawn accrued is to enable the treasurer to determine against the funds of what year the same are chargeable. The fiscal county system of Idaho is one which is designed, with certain exceptions which we have already discussed, to make the expenses of each year a separate charge against the revenues of that year and not otherwise.

Shaw vs. Statler, 15 Pac. Rep. 833 (Cal.).
McGowan vs. Ford, 40 Pac. Rep. 231 (Cal.).

The statute in question is in furtherance of this general object. Subsequent to the issuance of the warrants involved in the Bingham county case, and Lemhi county case, *supra,* the legislature of Idaho enacted additional legislation amending Section 2009 of the Revised Statutes of 1887. That statute before the amendment was as follows:

> "All warrants issued by the auditor during each year commencing with the first Monday in January must be numbered consecutively, and the number, date, and amount of each, and the name of the person to whom payable, and the

purpose for which drawn, must be stated thereon, and they must at the time they are issued be registered by him."

As amended that section now appears as Section 2056 of Idaho Revised Codes, 1908, Vol. 1, and is as follows: (The italics are ours.)

"The auditor shall have prepared, in separate series, warrant blanks for each year. They must be numbered consecutively *and must show the year against the revenue of which they are to be issued.* He shall begin the use of a new series of warrants on the second Monday in April of each year. All warrants issued by the auditor shall be upon the warrant blanks *of the series for the year chargeable with the amount for which such warrant is issued,* and the number, date, and amount of each, and the name of the person to whom payable *and the purpose for which drawn must be stated thereon.* When the amount for which a warrant is to be drawn is greater than the sum of two hundred dollars, the auditor shall issue therefor warrants in sums of two hundred dollars or fraction thereof, unless there is cash in the county treasury in the fund against which such warrant is drawn for the payment of the same on presentation. All warrants must, at the time they are issued, be registered by the auditor."

This last declaration of the legislature prescribes the form in which the warrants must be drawn. The warrants sufficiently show when the liability for which they are drawn accrued, for they show the year against the revenue of which they

are to be issued in the manner required by Section 2056. This is made to appear by beginning the use of a new series of warrants on the second Monday of April in each year.

All warrants must be drawn upon the warrant blanks of the series for the year chargeable with the amount for which the warrants are issued.

The warrants in question were drawn upon forms prepared in accordance with the requirements of Section 2056, and they show upon their face that they are of the series of 1914.

In fact Section 2056 is complete in itself and fully covers the whole subject of the form of county warrants, and supersedes Sections 1955 and 2053, Idaho Revised Codes, Vol. 1. It covers precisely the same subject matter as was covered by the two sections last cited, and supersedes them upon the familiar principle that a later statute, complete in itself, impliedly repeals a prior statute covering the same subject matter.

But even if it should be held that Section 2056 does not supersede Sections 1953 and 2053, it at least declares the manner in which a warrant shall sufficiently show when the liability for which it was drawn accrued.

(D) THE CONTRACT WAS PERFORMED BY NEASE, THE DEFENDANT COUNTY ACCEPTED HIS WORK, DULY ALLOWED HIS CLAIMS THEREFOR, AND IS BOUND THEREBY.

(a) As the work progressed Nease filed with the board of county commissioners his report of the lands theretofore cruised by him, and his claims for payment for the same. These reports were examined by the board of county commissioners. (See testimony of following witnesses: Zelenka, Record pp. 355 to 357; Torgerson, Record p. 399; Harrison, Record p. 401.)

The claims were thereupon allowed by the board and warrants therefor issued to Nease. Section 1917 of the Idaho Revised Codes, Vol. 1, defines the powers of county commissioners, and subdivision ten thereof is as follows:

> "To examine, settle and allow all accounts legally chargeable against the county, and order warrants to be drawn on the county treasurer therefor, and provide for the issuing of the same."

Section 1947 of the above code is as follows:

> "The board of commissioners must not hear or consider any claim in favor of an individual against the county unless an account properly made out, giving all items of the claim, duly verified as to its correctness, and the amount claimed is justly due, is presented to the board

within a year after the last item of the account accrued."

Nease's claims were properly made out and verified as required by law and filed. (See Plaintiff's Exhibit No. 4, Record p. 495; Plaintiff's Exhibit No. 5, Record p. 506; Plaintiff's Exhibit No. 6, Record p. 20; Plaintiff's Exhibit No. 5, Record p. 529.) Each of them shows by endorsement thereon that it was examined and allowed. The minutes of the meetings of the board also show that these claims were allowed. (See Plaintiff's Exhibit 8, Record p. 548.)

Paragraph 19 of the above Section 1917 of Idaho Revised Codes of 1908, enumerating the powers of county commissioners, is as follows:

> "At the adjournment of each session of the board, to cause to be published such brief statement as will clearly give notice to the public of all its acts and proceedings, and, semi-annually, a statement of the financial condition of the county. Such statement, as well as all other public notices of proceedings of, or to be had before, the board, not otherwise specially provided for, must be published in some newspaper, printed and published in the county, as will be most likely to give notice thereof; and, when in a weekly paper, it must be published in at least two issues thereof, or in at least five issues when the paper is published oftener than weekly; but when there is no newspaper published in the county, copies of such statement

must be kept posted for at least twenty days in three public places in the county, one being in a conspicuous place at the courthouse door."

The proceedings of the board in allowing these claims were published as required by law. (Record p. 224.)

Section 1950 of the Idaho Revised Codes 1908, provides for an appeal by any taxpayer from any order of the board within twenty days after publication of the notice of the order of proceedings of the board. This section is as follows:

"Any time within twenty days after the first publication or posting of the statement, as required by Paragraph 19 of Section 1917, an appeal may be taken from any act, or order or proceeding of the board, by any person aggrieved thereby, or by any taxpayer of the county, when any demand is allowed against the county, or when he deems any such act, order or proceeding illegal or prejudicial to the public interests; and no such act, order or proceeding whatever, which directly or indirectly renders the county liable for the payment of the sum of Three Hundred Dollars or over, or its equivalent, shall be valid until after the expiration of the time allowed for appeal, or until such appeal, if taken, shall be finally determined; but there is excepted from the operation hereof all orders for the payment of those sums specially directed by law to be paid, or payments in fulfillment of acts or proceedings made and confirmed according to the provisions hereof."

No appeal was taken from the order of the board allowing any of the claims.

If the board had authority to make the contract with Nease, it had power, and it was its duty, to determine whether the contract had been performed to its satisfaction, and its determination of that question and allowance of the claim cannot be avoided except for fraud, mistake or failure of consideration.

Shirk vs. Pulaski County, Fed. Cas. 12,794, (4 Dillion, 209).

Board of Com'rs vs. Sherwood, 64 Fed. 107.

Thompson vs. Searcy County, 57 Fed. 1030.

Falls City Const. Co. vs. Monroe County, 208 Fed. 485.

City and County of Denver vs. Republican Pub. Co. (Colo.), 155 Pac. 311.

Ward vs. Barnum, 52 Pac. 412, (Colo.).

Advertisers & Tribune Co. vs. Detroit, 5 N. W. 72, (Mich.).

Morehouse vs. Clerk of Edmonds, 70 Wash. 152; 126 Pac. 419.

McConoughey vs. Jackson, 35 Pac. 863 (Cal.).

McFarland vs. McCowen, 33 Pac. 113 (Cal.).

State ex rel. Devine vs. Peter, 120 N. W. 896 (Minn.).

Com'rs Court vs. Moore, 53 Ala. 25.

The defense in this case, in so far as it chal-

lenges the proper performance of the contract, is in effect an attempt to reconsider the action of the former board in accepting the work and allowing the claims.

A subsequent board has no right to reconsider the action of a former board in allowing a claim.

County of Cook vs. Ryan, 51 Ill. App. 190.

State ex rel. Cummings vs. Curley, 17 So. Car. 563.

State ex rel. Clark vs. Cathers, 41 N. W. 182 (Neb.).

Board of Com'rs vs. Leonard, 34 Pac. 583 (Colo.).

Wayne County vs. Reynolds, 85 N. W. 574 (Mich.).

The decisions are practically unanimous on this point. (See note 21 L. R. A. (N. S.), page 291.) Not even the board allowing the claim can reconsider it after the warrant has been issued and sold to an innocent purchaser for value.

Eldorado County vs. Elstner, 18 Cal. 144.

Placer County vs. Campbell, 11 Pac. Rep. 602 (Cal.).

Colusa County vs. D. Jarnett, 55 Cal. 373.

Central Bank of Westchester Co. vs. Shaw, 106 N. Y. Sup. 94.

California decisions are particularly applicable, because the statute of Idaho giving power to county

commissioners was substantially taken from the California code.

The board of county commissioners is a tribunal with *quasi* judicial powers, and in passing on the claims acts judicially.

Gorman vs. County Com'rs, 1 Ida. 553.

Tilden vs. Sacramento Co., 41 Cal. 68.

The evidence does not show any facts to justify the court in holding that the county is not bound by the action of the board of county commissioners in allowing the claims. The District Court was of this opinion. (See Record, p. 186.)

The warrants were *prima facie* evidence of a valid indebtedness, and the burden of proving the facts to overcome the *prima facie* case rests on the defendant.

County of Apache vs. Barth, 177 U. S. 438; 44 L. Ed. 878.

Board of Com'rs vs. Home Savings Bank, 200 Fed. 35.

Rollins vs. Board of Com'rs, 90 Fed. 575.

Hubbell vs. City of South Hutchinson, 68 Pac. 52 (Kan.).

Ray vs. Wilson, 14 L. R. A. 773 (Fla.).

McQuillan, Municipal Corporations, Sec. 2258.

It is difficult at best to cite the record to show to the court the absence of evidence; and it is par-

ticularly so in this case. The conduct of the board in examining and allowing the claims will be found detailed by the following witnesses: Zelenka, Record pp. 355 to 357; Torgerson, Record p. 399; Harrison, Record p. 401.

The court will search the record in vain to find any evidence of fraud or artifice practiced on the board.

But even if it should be held that the acceptance of the work by the board of county of commissioners does not preclude inquiry into the character of the work, nevertheless the contract itself prevents the defendant county from successfully urging defective work as a defense to this action.

Nease, by paragraph 4 of the contract, was required to furnish a bond in the sum of $10,000.00, conditioned that he would faithfully perform all of the terms and conditions of the contract, which bond was in force until the first day of October, 1915. (Record pp. 97 and 87.) Paragraph 7 of the contract is as follows:

> "It is further stipulated and agreed, that all cruises that shall be rejected by the first party shall be corrected and the proper report and correct cruise of the land included therein shall be made by the second party accordingly as directed by the first party, and if the second party fails so to do, the first party shall have

> the right to cause the same to be cruised and the reports accordingly as hereinbefore agreed to be made, and the cost and expense thereof above twelve and one-half cents per acre shall be paid by the second party to the first party on demand, and the payment thereof shall be secured by the bond filed herewith."

Under this paragraph of the contract the remedy of the county for any defective work is fixed. The work was completed in October, 1914. All of Nease's reports, in book form, were filed with the county. (Record p. 331.) Nease's bond was in force for a year thereafter, and the county had one year within which it had recourse to the bond for any failure on Nease's part, to correct the defective cruise. Moreover, it still has that remedy against Nease. Both parties to the contract knew that it was not to be performed by Nease in person, but to be performed by men hired by him and under his direction. It was impossible that their work should always be under his eye. The contract contemplated that there might be defective work. Provision therefor was made in the contract for the protection of both parties in case any such defective work should occur. We submit that after the county has once accepted Nease's work it cannot now, in the face of the plain provisions of the contract, refuse to pay for it, because of any defective work, if such there be, subsequently discovered, without first giv-

ing Nease an opportunity to correct the same.

And most certainly the whole claim is not bad even if some of the work should now be found to be defective.

(b) We think we have shown that if the county commissioners had authority to make the contract with Nease they, and they alone, had authority to pass upon the question of its proper performance, and that they have done so. If this is the law, then of course it is not for the court to substitute its judgment for that of the commissioners. If the commissioners had authority to contract for a cruise at all, it was for them to say what kind of a cruise would answer their purposes.

While we insist that the question of substantial performance by Nease under his contract has been foreclosed by the action of the board of county commissioners in accepting the work, and that all other evidence as to the character of the work is incompetent and immaterial, we will briefly call the attention of the court to the general character and nature of this evidence. One of the chief objections made to the character of the work is that some of the cruising was done by what is known as the "single run" method. The contract does not provide for any particular method of cruising. An adequate

reason, and no doubt the true reason, for this is that there are various methods for cruising timber. Some cruisers use one method and some another. Moreover, the same cruiser will use different methods, according to the character of the country and the timber; and the amount of experience a cruiser has had may determine whether he will use one method or another, in cruising a particular piece of land. See Bulletin 36 (Woodman's Handbook, issued by Department of Agriculture in 1912; especially pages 60, 64, 65 and 72. See also testimony of Fohl, a witness for the defendants. Record p. 316.) Cruising is not an exact science in any event, and "single run" cruising, by a competent man, is a general and well recognized method. (See testimony of Fohl, a witness for defendants. Record p. 317.) Of course, it is not so accurate as the "eight run" or "sixteen run" method used by Lacy and Company. This, however, is an unusual method, and its expense generally prohibitive. (Testimony of Croman, Record p. 449.) A description of the various methods of cruising may be found in the testimony of the following witnesses: Testimony Conry, Record p 425; Hamer, Record p. 431; Croman, Record p. 448.

"Single run" cruising is allowed in cruising

for the United States Government. (Record p. 433.)

The county employed one Wherry, a former employe of Nease, to recruise some of the lands cruised under the Nease contract, for the purpose of showing that Nease's work was inaccurate. Wherry made this cruise in company with one John Swanson and the result of their cruise, as compared with that of Nease, is shown by Defendant's Exhibit 4 (Record p. 596). Wherry's evidence in regard to this cruise appears at pages 256 to 272 of the record. He admitted that he had a hostile animus towards Nease, and his letters show that this was bitter. (Record pp. 267, 268; Plaintiff's Exhibits 11, 12, 13, Record pp. 552, 554, 556.) The witness Murray, at whose house Wherry lived for some time, testified that in his judgment a man having Wherry's animus toward Nease could not make an impartial check of Nease's cruise. (Record p. 386.) And this is necessarily so, because cruising is, after all, but an estimate based upon judgment. Under these circumstances it is probable that the Nease cruise was more nearly correct than Wherry's.

Notwithstanding the fact that Nease's cruise was completed in the fall of 1914 and this action was not tried until May, 1916, the defendant county

made no attempt to check the correctness of Nease's cruise except by Wherry, with Swanson working with him. They recruised 6,448 acres. (Record p. 269.)

The examination of Defendants' Exhibit Four (Record p. 596) shows that the timber on these lands was, in general, light, scattering and varied, giving the widest opportunity for difference in judgment, and especially where it was desired that such difference should exist.

Some claim was made by the defendants, and doubtless will be here, that some of the work was done hurriedly, and that several of the cruisers covered too much ground in a day. Some men can do more than others, and the amount that can be done depends largely upon the character, amount and quality of the timber, and especially upon the ease or difficulty with which the ground can be travelled. (Record pp. 428, 429, 433.) Some of Nease's cruisers on some days would cruise as much as 480 acres, and in one instance as much as 640 acres. This was not usual, however.

Theodore Fohl, a witness for the defendants, testified that he covered, in cruising for the Clearwater Timber Company, whose agent he was in

Clearwater County, from 160 acres to 640 acres per day. (Record p. 316.)

Moreover, Wherry and Swanson, when they were doing their cruising for the county to check some of Nease's work, to qualify themselves as witnesses in this suit, testified that they cruised 240 acres on most days, and on one day they had cruised 200 acres between 7:30 and 11:30 A. M. (Record p. 475.) It is to be supposed that Wherry and Swanson were trying to find all the timber they could. If the county's witnesses could properly cruise 200 acres (and double run it) before half past eleven A. M., we see no reason for supposing that a competent man could not, under favorable circumstances, occasionally cruise 640 acres, working long hours, as testified by the witness Olinger. (Record p. 429.)

All the cruisers employed by Nease were exceptionally competent men. All of them, with the exception of Snyder, had long experience in cruising, and were of the highest standing in the business. Not all of them could be produced as witnesses, but see testimony of the following:

Conry, Record p. 425.

Hamer, Record p. 431.

Clark, Record p. 440.

Penegor, Record p. 443.

Croman, Record p. 448.
Miller, Record p. 451.
Snyder, Record p. 457.
Hart, Record p. 458.
Kelley, Record p. 459.
Olinger, Record p. 459.
Johnson, Record p. 461.
Bennison, Record p. 463.
Dockery, Record p. 467.
Murray, Record p. 377.
Randolph, Record p. 247.

There is possibly one exception to the above. Morrow was found not to be uniform in his work and worked only 26 days during the spring and was not re-employed in the fall. See testimony of county's checker Gorman, Record p. 409; testimony of Morrow, Record p. 281; testimony of Nease, Record pp. 346 to 348.

(E) THERE WAS NO FRAUD IN THE MAKING OF THE CONTRACT.

Inasmuch as the trial court did not find that there was any fraud in the making of the contract, and in its opinion stated that there was no such fraud, it may be unnecessary for us to dwell upon this point. However, we shall call the court's attention to that part of the evidence which we under-

stand the defendants relied on to show such fraud.

(a) One circumstance was that the contract was let without advertisement. There is no statute of Idaho requiring an advertisement for bids. In the absence of such a statute, no such advertisement is required.

11 *Cyc.* 479, 480.

Dillon on Municipal Corporations, Vol. 2, p. 802, 5th Ed.

State ex rel. Huse et al. vs. Supervisors, 37 N. W. Rep. 936 (Neb.).

State ex rel. Gapen vs. Somers, 53 N. W. Rep. 146 (Neb.).

The failure of the commissioners to do something that the law does not require them to do is certainly no evidence of fraud.

(b) One other circumstance which was relied upon was the fact that other parties, Hunt and Rankin, offered to do the work at a lower price. Hunt's offer appears as Exhibit 3 of defendants' answer, found on page 47 of the record. The court will observe that his proposal was that the county itself should pay the cruisers' hire. His offer was that the cost should not exceed 10 cents per acre. The bond, however, that he proposed to give was not to be conditioned that the cost would not exceed that amount. If the county was to be liable to pay

the men hired by Hunt, it had no protection except Hunt's unsecured agreement that the cost might not greatly exceed the amount for which Nease agreed to do the work.

Rankin's offer appears as Exhibit 4 of defendants' answer, at page 51 of the record. He offered to do the work for seven and one-half cents per acre.

Both Hunt's proposition and Rankin's proposition were made to the board of county commissioners at the time the contract with Nease was made, Feb. 24, 1914. The board of county commissioners investigated Rankin and Hunt's responsibility before entering into the second contract with Nease, and they stated that they did not think that they were able to take the contract. (Testimony: Zelenka, Record pp. 358, 359; Harrison, Record pp. 299, 304, 305; Torgerson, Record pp. 398, 399.) Neither Rankin nor Hunt were witnesses at the trial nor was the deposition of either of them taken. Under the circumstances these offers of Rankin and Hunt are certainly not evidence of what is a reasonable price to be paid for such work as Nease agreed to do; nor evidence of fraud on part of Nease or the commissioners.

(c) There was some claim that the contract

price was excessive. There is no evidence to support this. It is the same price for which Nease was contracting to do similar work for other counties. (Record pp. 336, 337.)

(d) Some point was made of the fact in the trial court that Nease made too large a profit on his contract. This would be no evidence of bad faith in the making of the contract. Moreover, even if it were a fact that the county agreed to pay too much, that fact cannot now be considered by this court.

New Orleans vs. Warner, 175 U. S. 120.

Speer vs. Board of County Com'rs, 88 Fed., at p. 754.

(e) The board of county commissioners used much more care than is ordinarily exercised by such boards in investigating the responsibility of the contractor. (See testimony witness Zelenka, Record pp. 358, 359; testimony of witness Torgerson, Record pp. 398, 399.) Zelenka and Torgerson were members of the board of county commissioners.

Nease was engaged in the business of timber cruising by contract, and had been employed to do like service by counties in the States of Oregon and Washington, and also for other counties in the State of Idaho. (Testimony Nease, Record p. 336; testimony Zelenka, Record pp. 353, 354.)

(f) One circumstance that was alleged and proved by the defendants was the bringing and pendency of a certain suit by one John Lewis. The complaint in the Lewis suit is shown as Defendants' Exhibit No. 21, at page 648 of the record. That action was a suit in equity to restrain the performance of the contract between Nease and the county, dated February 24, 1914. This was not the contract in controversy in the suit at bar. The same plaintiff, John Lewis, appealed to the District Court of the Second Judicial District of Idaho from the order of the board of county commissioners, entering into the second contract with Nease, which is the one in controversy in this suit. The first mentioned of these proceedings, i. e., the suit in equity, was pending until the 14th day of October, 1914, when it was dismissed (Record p. 106.) Lewis' appeal was also dismissed about the same time (Record p. 342). There is no evidence to show that this appellant or Nease had anything to do with instituting or delaying the disposition of either of these actions; in fact, the evidence is quite to the contrary. (See testimony of Nease, Record p. 334; Tannahill, Record p. 464; Beckett, Record p. 463.)

Lewis had no interest in this suit. It was instituted at the request of Mr. Fohl, the agent of the

Clearwater Timber Co., and dismissed at his request. (Record p. 319.)

SPECIFICATIONS OF ERROR NOS. III, IV AND VII.

These three specifications of error may be argued together.

Specification No. III is that the court erred in refusing to enter a decree adjudging that the claims filed by Nease for work performed under the contract, and allowed by the county commissioners, were each and all valid debts against the defendant county.

Specification of error No. IV is that the court erred in failing and refusing to enter a decree against the defendant county in favor of the appellant for and on account of the work performed by Nease under the contract in the sum of $49,-561.99, that being the amount of the allowed claim with interest to the date of the entry of the decree.

Specification of error No. VII is that the court erred in refusing to enter a decree for the plaintiff and against the county for the above amount.

We have already presented the grounds upon which, in our opinion, the court was bound to hold

that the claims filed by Nease were valid claims against the county, and that Nease was entitled to be paid for his work.

The additional argument that we desire here to make relates to the question of what decree the court should render in case it should hold that the warrants were defective in form because not sufficiently specifying the liability for which they were drawn and when it accrued.

(a) Under the pleadings in this case the court will not deny this plaintiff relief even though it should hold that the warrants are defective in form. The Bingham County case, *supra* (122 Fed. 16), was an action at law brought upon the warrants, and that case was brought before equitable relief could be had in an action at law in the Federal court. The case at bar is in equity. The defendant, by its answer, challenged the validity of the contract between Nease and Clearwater County, and the validity of the debt for which the warrants were issued, and prayed that the contract be declared cancelled; that the warrants be delivered for cancellation, and that the county be decreed not liable by, for, or on account of the issuance of said warrants. (Record pp. 43-44.)

The reply of the plaintiff met the issue so ten-

dered, and prayed that the warrants be decreed to be valid warrants of Clearwater County, and that the plaintiff be decreed to have a valid and subsisting claim against the defendant county for the amount for which the warrants were issued. (Record pp. 168-169.)

While the bill of complaint is for an injunction against the treasurer, the county itself was made a party to the end that it, in its corporate capacity, might set up any defense that it might have to the payment of the warrants in order that if it elected so to do the whole controversy might be determined in this action. It did so elect, and properly so. The case was tried upon all the issues so tendered.

If Nease was entitled to be paid for the performance of his contract it would now be the height of injustice to deny this appellant relief because the county has failed to issue to Nease the kind of a warrant which, under the law, Nease was entitled to receive.

(b) The assignment of the warrants carries the right to recover on the original claim if the warrants should be invalid in form.

Chelsea Sav. Bank vs. City of Ironwood, 130 Fed. 410.

Board of Com'rs vs. Irvine, 126 Fed. 689.

Geer vs. School Dist. No. 11, 111 Fed. 682.

Skirk vs. Pulaski County, Fed. Cas. No. 12,794.

First National Bank of New York vs. Cook, 61 N. W. 693 (Neb.).

Dana vs. City of San Francisco, 19 Cal. 486.

Citizens Savings & Loan Ass'n vs. Belleville & S. I. R. Co., 117 Fed. 109.

Fernald vs. Town of Gilman, 123 Fed. 797, same case 141 Fed. 941.

Louisiana vs. Wood, 102 U. S. 294.

McQuillan, Municipal Corporations, Sec. 2251.

Where a bond or warrant is invalid but the claim valid, a judgment under proper pleadings may be rendered on the original liability.

Town of Gilman vs. Fernald, 141 Fed. 941, 944.

Board of Com'rs vs. Irvine, 126 Fed. 689, 693.

Geer vs. School District No. 11, 111 Fed. 682, 690.

Under Equity Rule 23 the court will render a judgment settling the entire controversy.

Franey vs. Warner, 71 N. W. 81, 86 (Wis.).

The county having received and retained the fruits of the contract cannot shield itself by a plea of irregularities.

City of Des Moines vs. Wellsbach Street Lighting Co., 188 Fed. 906.

(c) If necessary, this court would reform the warrants or direct that the defendant county issue to the appellant warrants proper in form. But this is unnecessary because the county itself is before the court. It is the real party in interest, and its only interest is in the question whether it is liable to pay the claim for which the warrants were issued. The objection to the form of the warrants touches only the manner of getting the money out of the treasury. The county itself being before the court, the judgment will protect the disbursing officer.

(d) If the county commissioners had authority to make the contract, and accepted the benefits of the work, they must pay for it.

Wycoff vs. Strong, 25 Ida. 502.
S. C. 144 Pac. 341.
Campbell vs. Hildebrand, 3 S. W. 243 (Tex.).

That they have accepted the benefits of the work is shown by the fact that they still retain the plat books and reports which Nease supplied them in accordance with his contract. The county has used his work in making assessments. (Record pp. 303, 402, 403.)

The county got the benefit of the cruise in increasing the taxable property of the county. (Tes-

timony of Torgerson, Record p. 399.) Before the completed cruise was all available it brought about $3,000,000 of increased value on the tax rolls. The taxes of two timber companies only were increased $37,000 and others in the same proportion. (Testimony of Blake, Record pp. 416, 417.)

The county also used the cruise before the State Board of Equalization with its approval. (Record pp. 309, 310, 417.)

(e) It may be urged that the defendant county has a right to a trial by jury of the question of its liability. The case has been tried as one of equitable cognizance, and it is too late now to contend that the court cannot try all the controversies raised by the pleadings.

Municipal Sec. Co. vs. Baker County, 54 Pac. 174 (Or.).

O'Hara vs. Parker, 39 Pac. 1004 (Or.).

Beyer vs. Le Fevre, 186 U. S. 114, 46 L. Ed. 1080.

Reynes vs. Dumont, 130 U. S. 354, 32 L. Ed. 934.

Kilbourn vs. Sunderland, 130 U. S. 505, 32 L. Ed. 1005.

Southern Pac. R. Co. vs. United States, 200 U. S., at p. 352, 50 L. Ed. 511.

The act of Congress of March 3, 1915, "sub-

stantially abolished the technical distinctions between proceedings in law and equity."

United States vs. Richardson, 223 Fed. 1010.

Since the issues were tried before the court sitting as a court of equity it is now immaterial whether the case be considered as one at law or in equity.

United States vs. Illinois Surety Co., 226 Fed., p. 653.

See especially petition for rehearing, pp. 663 and 664.

Collins vs. Bradley Co., 227 Fed. 199.

National Surety Co. vs. United States, 228 Fed. 577.

By asking for equitable relief the defendants are estopped from claiming that the suit is not one of equitable cognizance.

Municipal Sec. Co. vs. Baker County, 54 Pac. 174 (Ore.).

O'Hara vs. Parker, 39 Pac. 1004 (Ore.).

Beyer vs. Le Fevre, 186 U. S. 114.

Reynes vs. Drumont, 130 U. S. 354.

Kilborn vs. Sunderland, 130 U. S. 505.

S. P. Co. vs. U. S., 200 U. S. 341.

SPECIFICATIONS OF ERROR NOS. V AND VI.

These two specifications can be argued together. Specification of error No. V is that the court erred in not enjoining the defendant treasurer from paying out of the warrant redemption fund warrants registered subsequent to the registration of appellant's warrants.

Specification No. VI is that the court erred in refusing to decree that the treasurer be required to pay and call all warrants out of the warrant redemption fund in the order of their registration.

Section 1955 of Idaho Revised Codes, Vol. 1, *supra,* requires that all warrants be presented to the county treasurer, and if not paid, registered; and thereafter paid in the order of their registration. Appellant's warrants were presented and registered. (Record p. 221.)

(a) If the warrants were valid, injunction was the proper remedy.

E. H. Rollins & Sons vs. Board of Com'rs, 199 Fed. 71, see p. 79.

President, etc., of Yale College vs. Sanger, 62 Fed. 177.

Cunningham vs. Macon, etc., R. R. Co., 109 U. S. 446, 27 L. Ed. 993.

Hagood vs. Southern, 117 U. S. 52; 29 L. Ed. 805.

Hans vs. State of Louisiana, 134 U. S. 1; 33 L. Ed. 842.

Pennoyer vs. McConnaughty, 140 U. S. 1; 35 L. Ed. 363.

Mutual Life Ins. Co. vs. Boyle, 82 Fed. 705.

Starr vs. Chicago, R. I. & P. Ry. Co., 110 Fed. 3.

Southern Ry. Co. vs. Greensboro Ice & Coal Co., 134 Fed. 82, p. 93.

(b) It was contended before the District Court by the defendant that the treasurer could not be compelled to pay the appellant's warrants because no certified list of the claims allowed and for which the warrants were issued had ever been filed by the county commissioners with the county treasurer as required by the statute. The statute in question is Section 1943 of Idaho Revised Codes, Vol. 1, and is as follows:

> "SEC. 1943. The board must require their clerk, at the close of every session, to furnish them with a list of all bills and accounts of every nature approved by them at said session, giving the name of each person in whose favor an account or bill of any kind or nature has been allowed, with the amount allowed him and out of what fund the same is to be paid. They must compare their list with the record of their proceedings, and if not found correct, make it so and certify to said list and file it with the county treasurer, and the treasurer must pay no warrant drawn on any fund in the

county treasury that does not correspond with the files furnished him by the board."

The evidence on this point is as follows: Oren D. Crockett, the defendant treasurer, when called as a witness for the defendant, produced in court the book used by the board of county commissioners of the defendant county for the year 1914, and which they furnished to the treasurer to show the claims allowed by the board. The book contains a list of the claims allowed for which the warrants in controversy were issued but such list is not certified. The following warrants of the appellant's were not listed: 7331 to 7339 inclusive, and warrants numbered 7343, 7596, 7597, 7598, 7599 and 7656.

It appears that claims of other parties were allowed and warrants issued therefor for which no certified list was given to the county treasurer, showing that the county officials, from carelessness or other cause, did not always comply with the requirements of the statute. (Record p. 226.)

It appears that the county commissioners did furnish to the treasurer a list of the Nease claims allowed, with the exception of 15 of the warrants, but that the same was uncertified. It is contended that the treasurer cannot be compelled to recognize

appellant's warrants because no certified list has been furnished him by the commissioners. It will be noted that the warrants were presented to the treasurer; stamped by him "not paid for want of funds," and thereafter registered by him. (Record p. 221.)

The treasurer, after appellant had purchased the warrants, corrected his registration stamp on two of them at the request of the appellant. (Record p. 221.)

The object of the above statute is plain. It gives the treasurer a check on the auditor, and insures that the treasurer will not pay any warrants that have not been allowed by the board of commissioners. It certainly would be absurd to hold that the county, after having accepted a contractor's work, and allowed his claim, and issued warrants to him for the same, could avoid payment because of the neglect of its commissioners to file a certified list with the treasurer.

It may be that if the county itself were not a party to this action, the treasurer could object to being compelled to pay warrants until the certified list was filed with him. But the court will recognize that the object of the statute is to protect the county

against the payment of unallowed claims. The lack of a certified list does not make the warrants invalid. It simply requires that the treasurer do not pay them until evidence is filed with him that the claims for which the warrants were drawn have been allowed.

There were filed as exhibits in this case the records of the board of county commissioners showing that the claims had been allowed. (Plffs. Exhibit 4, Record p. 495; Plffs. Exhibit 5, Record p. 506; Plffs. Exhibit 6, Record p. 520; Plffs. Exhibit 7, Record p. 529; Plffs. Exhibit 8, Record p. 548.) This is sufficient. The county itself is a party defendant to this action, and the judgment of the court will protect the treasurer in making payment.

The mere fact that the county officers have neglected to do their duty in keeping proper records, as between themselves, would not justify the county treasurer in dissipating the funds applicable to the payment of the appellant's warrants if they were legally issued.

Sims vs. Milwaukee Land Company, 20 Ida. 513.

S. C., 119 Pac. 37.

Speer vs. Board of County Com'rs, 88 Fed., at p. 757.

City of Des Moines vs. Wellsbach Street Lighting Co., 188 Fed. 906.

Moreover, when the county commissioners delivered to the treasurer the list of allowed claims for the purpose of informing him as to what claims had been allowed, their action was sufficient certification.

Specifications of Errors VIII, IX, X, XI, XII, XIV, XV, XVI, XVII, XVIII.

Each of these specifications allege error by the court in the admission of evidence. All such evidence was admitted for the purpose of showing either:

(a) Defects in Nease's work (See Specifications of Error Nos. VIII, IX, X, XI, XII, XVI, XVII), or

(b) The amount which it cost Nease to do the work (See Specifications of Error Nos. XIV, XV).

We have already shown that the accepting of the work by the board of county commissioners precludes inquiry in this suit into the correctness of Nease's work.

We have already shown in arguing specification of error No. II that the cost of the work to Nease is immaterial.

We recognize the rule that in an equity case the decree will not be reversed on appeal because of the admission of improper evidence, if there is sufficient proper evidence in the record to sustain the decree. We insist upon the errors in the admission of testimony for the purpose of preserving in this court the objection to such evidence, and confining the inquiry by this court to proper evidence.

It is respectfully submitted that the decree of the lower court should be reversed with directions to the lower court to enter a decree granting the prayer of the appellant as made in its bill of complaint, and in its reply, adjudging that each and every warrant described by the appellant in its bill is a valid and subsisting warrant of Clearwater County according to the amount and tenor thereof, and enjoining the defendant treasurer of said county from paying out of the warrant redemption fund of said county any warrants of said county registered by the treasurer of said county subsequent to the registration of any unpaid warrants of the appellant, and enjoining the treasurer of said county from paying out of the said warrant redemption fund any warrants of said county except in the order the same have been registered by the treas-

urer of said county until all of the appellant's warrants have been paid.

In case this court should hold that any of said warrants are invalid because insufficient in form, this appellant asks that such warrants be reformed or in lieu thereof that appellant have judgment against the defendant county for the amount thereof.

In case this court shall hold that any part of the claim for which said warrants were issued is invalid, this appellant asks that it have relief as above prayed for so much of its claim as shall be held by this court to be valid; and plaintiff prays for such other and further relief as to this court may seem meet and equitable in the premises.

PETERS & POWELL,
H. B. BECKETT,
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Attorneys for Appellant.

APPENDIX I.

Chapter 58 of the Session Laws of Idaho for the Year 1913 Regulating the Assessment and Taxation of Property.

Section 2. "All real and personal property subject to assessment and taxation must be assessed at its full cash value for taxation for state, county, city, town, village, school district and other purposes. * * *"

Section 6. "Real property for the purposes of taxation shall be construed to include land, and all standing timber thereon, including standing timber owned separately from the ownership of the land upon which the same may stand. * * *"

Section 15. "In ascertaining the value of any property the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion any value or price for which the property would sell at auction or at forced sale, or in the aggregate with all the property in the taxing district; nor, on the other hand, shall he adopt a speculative valuation, or one based upon sales made upon the basis of a small cash payment and installments payable in the future, but he shall value each article or piece of property by itself and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made."

Section 34. "The assessor must have prepared a full, accurate and complete plat-book of his county, in which shall be platted all townships and fractional townships which have been officially surveyed and platted by the United States government;

such plats to be made in a draftsmanlike manner on a scale of four inches to the mile. All lands in the county upon which final proof has been made, or which have been approved for patent, shall be platted thereon in such manner as to correspond with the technical description of such lands as described by the government survey thereof, and on each of such tracts shall be entered the assessed valuation thereof and the name of the present owner. * * * It is hereby made the duty of the assessor to ascertain all changes in the ownership of land in his county from time to time, and make the proper changes in the names of the present owners in his plat-book. All necessary and reasonable expense incurred by the assessor in complying with the provisions of this section shall be a legal claim against the county."

Section 38. "On or before the fourth Monday of June after the passage and approval of this act, the register of the State Board of Land Commissioners must furnish to the assessor of each county in this state, without fee, upon blanks to be supplied by the state auditor, a complete list duly certified, of all lands in such county sold by the state, and on the second Monday of January, annually thereafter, furnish to such assessor a certified list of all lands in such county which have been sold, or on which payments have been made, or to which the state has issued its deed, since the last list was furnished. Such lists shall show all lands or timber in the county for which the state has issued its deed or certificate, the selling price of all lands in the county sold on contracts providing for the payment thereof in installments, and the amount of the principal of such selling price which has been paid at the date of such lists. The register of the State Board of Land Commissioners shall be liable upon his official bond for all taxes lost on

account of his failure to furnish the lists as herein provided, to be recovered in an action brought by the county attorney of the county affected, in the name and for the benefit of such county. Any amount so recovered shall be apportioned as other taxes levied for the year in which such property escaped assessment."

SECTION 39. "The assessor must assess all real property in his county, subject to assessment by him, between the second Monday of January and the fourth Monday of June in each year and must complete such assessment on or before the said fourth Monday of June. In making such assessment the assessor shall actually determine, as near as practicable, the full cash value of each tract or piece of real property assessed, and shall enter the value thereof, and the value of all improvements thereon * * * in appropriate columns against the description of such real property in the real property assessment roll. The tax levies shall be extended on the aggregate valuations of said property, real and personal, after deducting the amount of any exemptions allowed, and any personal property so entered upon the real property assessment roll must not be entered upon the personal property assessment roll."

SECTION 48. "For purposes of assessment lands shall be classified as follows:

Lands outside of cities, towns, villages or townsites:

A. Agricultural land, being land used or susceptible of use for general agricultural purposes, including land in use or susceptible of use for orchard or vineyard purposes, and land used or susceptible of use for scientific dry farming.

B. Timber land, being land on which there

is standing timber of commercial quantity and quality.

C. Cut-over and burnt timber land, being land from which timber has been cut or burned, leaving nothing but stumps and burnt timber, and which burnt timber is not at the time of the assessment useful for any commercial purpose. Where timber land is held under separate ownership from the timber thereon the land itself shall be classified under this heading.

D. Mineral land, being land used or susceptible of use for mining.

E. Grazing land, being land not used or susceptible of use for agricultural purposes and which is useful only in large areas for stock grazing.

F. Waste land, being land not susceptible of use for agricultural or commercial purposes. * * *"

SECTION 49. "The classification provided for in the preceding section shall be entered against the description of all land in separate columns on the real property assessment roll, showing the number of acres of land and the value thereof *in each class of land* outside of cities, towns, villages or townsites and the value of each class of land in cities, towns, villages and townsites. The assessor shall exercise his best judgment in classifying land in accordance herewith, but the classification made by him may be amended or revised, and a new classification made, or the classification of any particular tract or lot changed by the board of county commissioners, if in the judgment of such board such land has not been correctly classified in accordance with the provisions of the preceding section."

SECTION 50. "In case standing or growing timber is owned separately from the ownership of the land on which it stands or grows, such timber shall

be entered upon the real property assessment roll separate and apart from the land, and the number of acres and the value thereof entered in columns provided for that purpose."

SECTION 53. "The assessor must complete the real property assessment roll on or before the fourth Monday of June in each year, and must, on or before said date, deliver the completed real property assessment roll, together with all taxpayer's statements and claims for exemption relating to the assessments entered thereon, to the clerk of the board of county commissioners. The said assessment roll, taxpayer's statements and claims for exemption, must remain in the office of the said clerk until the meeting of the said board as a board of equalization, for the inspection of all persons interested."

SECTION 55. "The board of county commissioners of each county in this state shall meet as a board of equalization on the first Monday of July in each year, and shall continue in session from day to day up to and including the fourth Monday of July in said year for the purpose of equalizing the assessment of all property entered upon the real property assessment roll. * * *"

SECTION 56. "It is hereby made the duty of the board of county commissioners, at the meeting prescribed in the preceding section, to enforce and compel a proper classification *and assessment* of all property required under the provisions of this act to be entered upon the real property assessment roll, and in so doing the board shall examine such roll, tract by tract, and name by name and the valuation of each item of property assessed, and shall raise or cause to be raised, or lower or cause to be lowered, the assessment of any property which,

in the judgment of the said board, has not been assessed at its full cash value. The board must determine all complaints in regard to the assessed value of any property entered upon said roll, and must, except as prohibited in this act, correct any valuation entered upon said roll by adding thereto or subtracting therefrom such amount as may be necessary in order to make such valuation, conform to the full cash value, and must correct any assessment by adding to or subtracting from the amount, number, quantity or value of any property assessed, when a false, inaccurate, or incomplete taxpayer's statement has been rendered. * * *"

SECTION 58. "All changes in assessments and all new assessments ordered by the board of county commissioners, shall be entered in the assessment roll by the clerk of the said board, in the presence and under the direction of said board, and any assessment so changed or entered has the same force and effect as if made and entered by the assessor before the completion of the assessment roll."

SECTION 61. "The assessor must attend all meetings of the board of county commissioners in session as a board of equalization, and may make any statements, or introduce testimony and examine witnesses on questions before the said board relating to the assessment."

SECTION 62. "The board of county commissioners in session as a board of equalization may require the attendance of the county recorder, who must furnish the said board with any information which may be had from the records in his office and which the said board may deem necessary in equalizing the assessment, and may also require the attendance of any other county officer or deputy whose testimony may be needed, and may also sub-

poena witnesses and hear evidence in all matters relating to the assessment of property, and may arbitrarily value and assess the property of any person refusing to appear or testify, and any assessment so made shall be conclusive on all questions of valuation and assessment in any court or proceeding."

SECTION 64. "Any member of the board of county commissioners who knowingly permits any assessment to stand, or permits any alteration to be made in the assessment roll, whereby any property is assessed at more or less than its full cash value, shall be guilty of a misdemeanor and of malfeasance in office, for which he may be removed from office in the manner provided by law for the summary removal of public officers from office."

SECTION 211. "Any county officer upon whom any duties devolve under this act, or under the revenue laws of this state, who wilfully neglects or refuses to perform any such duty, or who performs them in a careless or incompetent manner, may be removed from office in the manner prescribed by law, and when proceedings are commenced to remove such officer from his office, the board of county commissioners, or in case such officer be a commissioner, then the probate judge, may suspend such officer from his powers and duties under the revenue laws, and appoint a competent person in his place until a proper tribunal has either removed or acquitted such suspended officer. * * *"

SECTION 65. "The clerk of the board of county commissioners must record all proceedings of the said board relating to the equalization of assessments, the allowance of exemptions, and all changes, corrections and orders made by the said board, and the names of all persons who have appeared

before the said board and who have been heard upon matters affecting the assessment of property, and a minute of all notices which have been mailed in accordance with Section 63 of this act, in the 'Minute Book' provided for in Section 1912 of the Revised Codes of Idaho."

SECTION 66. "On the fourth Monday of July the board of county commissioners must deliver the real property assessment roll, with all changes, corrections and additions entered therein, to the county auditor, who must add up the columns of amount and value of each kind and class of property, and of all property, and prepare an abstract of all the property entered upon said roll * * * showing the total number of items or pieces of property and the total value thereof, in each class the number of acres, average value per acre, and the total value of each class of land, the total value of each class of improvements on land, the total number and value of each kind of the different classes of livestock and the amount and value of each class of other property as shown in separate columns in the assessment roll * * * as determined by the board of county commissioners. The said abstract must be prepared in duplicate and duly verified upon blanks supplied by the state auditor, and must show a correct classification of all the property in accordance with the classification of such property upon the assessment roll, and all matters and things required to be shown upon said abstract must be entered in the proper spaces and columns provided for that purpose in the said blanks."

SECTION 68. "Any assessor who shall wilfully or knowingly enter, or suffer to be entered, any untrue or incorrect classification of land or other property upon the assessment roll; or any member of

any board of county commissioners who shall knowingly permit any such untrue or incorrect classification of property to stand, or any county auditor who *knowingly* makes an untrue or incorrect classification of the property, as entered upon the assessment roll, in his abstract of the assessment, or fail to transmit his abstract of the assessment within the time prescribed therefor in the preceding section, shall forfeit the sum of one thousand dollars, to be recovered upon his official bond for the use of the state."

Section 1586 of the Idaho Revised Codes Concerning the Taxation of State Lands Sold Under Contract.

Section 1586. "All lands sold under the provisions of this chapter shall be exempt from taxation for and during the period of time in which the title to said land is vested in the State of Idaho, but the value of the interest therein of the purchaser may be taxed, which interest shall be determined by the amount paid on such land and the amount invested in improvements thereon at the date of such assessment."

APPENDIX II.

Sections 3586, 3605, 3608 and 3609, Lord's Oregon Laws.

Section 3586. "The assessor after qualifying shall, on the first Monday in March, in each year, procure from the county clerk a blank assessment roll, and forthwith proceed and assess all taxable property within his county, except such as by law is to be otherwise assessed, and shall return to such county clerk on or before the third Monday in October next following, such assessment roll with a full and complete assessment of such taxable property entered thereon, including a full and precise description of the lands and lots owned by each person therein named, on March first of said year, at the hour of one o'clock A. M., which description shall correspond with the plan or plat of any town laid out or recorded; and said lands or town lots shall be valued at their true cash value, taking into consideration the improvements on the land and in the surrounding country, the quantity of the soil, its convenience to transportation lines, public roads, and other local advantage of a similar or different kind. True cash value of all property shall be held and taken to mean the amount such property would sell for at a voluntary sale made in the ordinary course of business, taking into consideration its earning power. No deduction of indebtedness from assessments or taxation shall be allowed in any case. All land shall be taxed in the county in which the same shall lie; and, except as otherwise provided by law, every person shall be assessed in the county where he resides at the hour of 1 o'clock A. M., on March first of the year when the assessment shall be made for all real and personal property owned by him within such county,

but if the owner of any land be unknown, such land may be assessed to 'unknown owner,' or 'unknown owners,' without inserting the name of any owner; but no assessment shall be invalidated by a mistake in the name of the owner of the real property assessed, or by the omission of the name of the owner, or the entry of a name other than that of the true owner, if the property be correctly described; and provided further, that where the name of the true owner, or the owner of record, of any parcel of real property shall be given, such assessment shall not be held invalid on account of any error or irregularity in the description; provided, such description would be sufficient in a deed of conveyance from the owner; or on account of any description upon which, in a contract to convey, a court of equity would decree a conveyance to be made."

SECTION 3605. "Each assessor shall give three weeks' public notice in some newspaper printed in his respective county; if there be no such newspaper, then by posting up notice in six conspicuous places in his county, setting forth that on the third Monday in October the board of equalization will attend, at the court house in his county, and publicly examine the assessment rolls, and correct all errors in valuation, description or qualities of lands, lots or other property assessed by such assessor; and it shall be the duty of persons interested to appear at the time and place appointed. Proof of such notice, if published in a newspaper, shall be made by affidavit as provided by law, filed with the clerk of the county where the newspaper is printed, on or before the third Monday in October in the year when such notice is printed; if such notice be posted, proof thereof shall be made by the affidavit of the assessor or his deputy, setting out the

time, manner and place of posting such notices, filed with the clerk of the county on or before the third Monday in October in the year when such posting is made."

SECTION 3608. "If it shall appear to such board of equalization that there are any lands or lots or other property assessed twice, or incorrectly assessed as to description or quantity, and in the name of a person or persons not the owner thereof, or assessed under or beyond the actual full cash value thereof, said board may make proper corrections of the same. If it shall appear to such board that any lands, lots or other property assessable by the assessor are not assessed, such board shall assess the same at the full cash value thereof."

SECTION 3609. "Said board of equalization shall not increase the valuation of any property on such assessment roll, as provided in the preceding section, without giving to the person in whose name it is assessed at least five days' notice to appear and show cause, if any he has, why the valuation of his assessable property, or some part thereof, to be specified in such notice, shall not be increased; provided, that such notice shall not be necessary if the person appear voluntarily before said board, and be there personally notified by a member thereof that his property or some specified part thereof, is, in the opinion of the board, assessed below the actual value; and provided further, that such notice shall not be necessary in event the board deem it necessary to increase the valuation of all property upon such rolls, in a certain proportion, in order that the valuation of the property generally upon the rolls shall be its full cash value, as by law required. Petitions or applications for the reduction of a particular assessment shall be made in writing, verified

by the oath of the applicant or his attorney, and be filed with the board during the first week it is by law required to be in session, and any petition or application not so made, verified, and filed shall not be considered or acted upon by the board."